TRANSCRIPT OF RECORD

SUPREME COURT OF THE [illegible]

[illegible]

No. 217.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY, [illegible] TIONER,

vs.

[illegible]

[illegible]

(19,283.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 217.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY, BY L. C. BLACK, ITS RECEIVER, PETITIONER,

vs.

CHARLES A. HARRIS ET AL., EXECUTORS OF B. D. HARRIS, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY, L. C. Black, Receiver, Complainant-Appellant,
vs.
CHARLES A. HARRIS ET AL., Executors, &c., Defendants-Appellants.

Transcript of Record.

Appeals from the circuit court of the United States for the district of Vermont.

Printed under the direction of the clerk.

[Stamped:] United States circuit court of appeals, second circuit. Filed Jan. 9, 1903. William Parkin, clerk.

1 Circuit Court of the United States, District of Vermont.

THE GREAT WESTERN MINING AND MANUFACTURING Company, Orator,
vs.
B. D. HARRIS, Defendant.
} In Equity.

Be it remembered, on the 8th day of July, A. D. 1895, the Great Western Mining and Manufacturing Company a citizen of Kentucky, by L. C. Black, its receiver, filed in the circuit court for the second circuit of the United States, within and for the district of Vermont, its bill of complaint against B. D. Harris, of Brattleboro, Vermont, and a citizen of the State of Vermont, which said bill of complaint is in the words and figures following:

2 The Circuit Court of the United States in and for the District of Vermont.

THE GREAT WESTERN MINING AND MANUFACTURING Company, by L. C. Black, Its Receiver, Plaintiff,
v.
B. D. HARRIS, Defendant.
} In Equity. No. —.

Bill of Complaint.

To the honorable the judges of the circuit court of the United States for the district of Vermont:

The Great Western Mining and Manufacturing Company, a citizen of Kentucky, by L. C. Black, its receiver, brings this, its bill,

against B. D. Harris, of Brattleboro, Vermont, and a citizen of the State of Vermont. And thereupon your orator complains and says:

That it is a corporation duly organized and doing business under the laws of the State of Kentucky; and that the defendant is a citizen of the State of Vermont; that the amount involved in this action is more than two thousand dollars ($2,000), exclusive of interest and costs

That G. D. Harris hereinafter mentioned is an inhabitant and citizen of the State of New Hampshire, and a resident of Keene, New Hampshire; that John Carlisle, hereinafter mentioned, *are* inhabitants and citizens of the State of Ohio and residents of
3 Cincinnati, Ohio; and that George S. Richardson, hereinafter named, is an inhabitant and citizen of the State of California, residing at California.

Your orator further says that it became incorporated under a special act of the legislature of Kentucky, on or about the 19th day of January, 1856, for the purpose of purchasing and ow-ing a mining property and the tools, implements and plant necessary for mining, managing and controlling the same, and mining and selling coal for profit; that in pursuance of the object of its incorporation and organization, on or about the 10th day of February, 1859, it became the owner of certain coal properties and coal mining plant situated in the county of Lawrence and State of Kentucky, of the value of about forty thousand dollars ($40,000); that the authorized capital stock of said company was two hundred thousand dollars ($200,000) divided into 2,000 shares of one hundred dollars ($100) each; that from the time of the organization of said company until November 10, 1887, the authorized capital stock of said company was $200,000, all of which capital stock was issued, in the aggregate of 2,000 shares of the par value of $100 per share; that said stock had previous to November 10, 1887, been owned by many and various persons, but on said 10th day of November, 1887, said capital stock was owned by the following named persons, in the amounts set opposite their names:

B. D. Harris, the defendant herein, 600 shares par value	$60,000 00
G. D. Harris, 600 shares par value.....	60,000 00
John Carlisle, 440 shares par value.....	44,000 00
George W. Carlisle, 300 shares, par value.....	$30,000 00
James C. Holden, 4 shares, par value.....	400 00
Loren Hinsdale, 4 shares par value	400 00
George S. Richardson, 52 shares, par value	5,200 00

That on the 10th day of November, 1887, for the purposes
4 hereinafter set forth, the said stockholders took action to increase the capital stock of said company, and did so increase said capital stock in the sum of fifty thousand dollars ($50,000); that said increased capital stock was divided among the said shareholders of said company as follows, to wit:

To B. D. Harris, 150 shares, par value	$15,000 00
To G. D. Harris, 150 shares, par value	15,000 00
To John Carlisle, 110 shares, par value	11,000 00
To George W. Carlisle, 75 shares, par value	7,500 00
To George S. Richardson, 13 shares, par value	1,300 00
To James C. Holden, 1 share, par value	100 00
To Loring Hinsdale, 1 share, par value	100 00

That on the 22d day of April, 1889, also for the purposes hereinafter set out, the said stockholders of said company took steps to further increase the capital stock of said company, and did so issue one thousand (1,000) shares of said capital stock of the par value of one hundred dollars ($100) each, and distributed such increased capitalization among its said stockholders as follows, to wit:

To B. D. Harris, 300 shares, par value	$30,000 00
To G. D. Harris, 300 shares, par value	30,000 00
To John Carlisle, 220 shares, par value	22,000 00
To George W. Carlisle, 150 shares, par value	15,000 00
To George S. Richardson, 26 shares, par value	2,600 00
To James C. Holden, 2 shares, par value	200 00
To Loring Hinsdale, 2 shares, par value	200 00

Your orator says that at the time the proposition to so as aforesaid increase the capital stock of said company was made and carried out the stockholders had formed the plan of issuing bonds upon the property and franchises of said company and selling the same; that the issue and distribution of the aforesaid capital stock was made for the purpose of defrauding said company and obtaining without consideration the aforesaid shares of capital stock of said company, and for the purpose of selling the same to said company in connection with the floating of the aforesaid loan, and for the purpose of defrauding the said company out of a portion of the proceeds of said loan; that said issue of capital stock was made by said stockholders and board of directors, of whom the defendant was one, ostensibly upon the consideration of certain alleged betterments to said property, which betterments it was pretended had been made and paid for out of the net earnings of the business of said company, which it was represented had enhanced the value of the property belonging to the stockholders.

Your orator alleges that, in fact, no such betterments had been made, or if they were made that they were paid for out of money borrowed upon the credit of said company, for which an indebtedness then existed and still exists against said company; that in fact there had been no net earnings of said company (which had been put into betterments for said company), and that the issue of said stock was without consideration and illegal and void and a breach of duty on the part of the stockholders and directors of said corporation to its creditors; that said stock still remains outstanding in the names of the parties to whom it was issued, or in the names of their

assignees; that afterwards, to wit, on the 13th day of May, 1889, the directors of said company, who were as follows, to wit, the said defendant B. D. Harris and the said G. D. Harris, George S. Richardson, John Carlisle, George W. Carlisle, Loring Hinsdale and James C. Holden, and who were also stockholders as aforesaid in said company, to the amounts herein before set out, for the purpose of defrauding said company and in pursuance of their previous fraudulent acts as hereinbefore set forth and for the purpose of abstracting the
6 assets of said company for their own use and benefit, completed and formed a combination, the corporation at that time being insolvent and unable to carry on its business, without providing means to pay its floating indebtedness (which amounted at that time to $100,000 or more), by which it was agreed between them that they would obtain a loan of $300,000 for said company, said loan to be evidenced by bonds of the number of 300 and of the denomination of one thousand dollars ($1,000) each, to be secured by a mortgage upon the property of said company and to bear interest at the rate of six per cent. per annum, payable semi-annually, with interest warrants attached to said bonds, and that negotiations were commenced with various persons in order to make a sale of said bonds; that at or about said time, and while said negotiations were going on, for the purpose of appropriating to themselves a portion of the moneys that might arise from the sale of said bonds, said directors of said company, who were the sole stockholders of said company, as hereinbefore shown, and of whom the defendant was one, caused to be issued to themselves shares of the capital stock of said company, as hereinbefore set forth; that said issue of stock was made, as above stated, ostensibly on the theory and upon the consideration that certain betterments had been added to the plant and property of the company which had been paid for out of the profits of the operations thereof, which profits would otherwise belong to said stockholders, when in truth and in fact said company was largely insolvent and had a mortgage debt of about sixty thousand dollars ($60,000) upon it and a floating indebtedness of one hundred thousand dollars ($100,000) or more, and when in fact said company had not made any net profits whatever, and said betterments, in fact, had not *made any net profits whatever, and said betterments in fact, had not* been made at all, or if made, had been paid for out of borrowed money which had never been repaid out of the
7 earnings of said company, and no consideration other than as hereinbefore just specified was ever paid by said stockholders for the stock so as aforesaid issued to them.

That it was in order to carry out the aforesaid purpose of abstracting from the assets of said company money arising from the sale of said bonds and solely for that purpose that said stock was so issued to the defendant herein, the said B. D. Harris, and the other said stockholders:

That thereafter said negotiations for the sale of said bonds were successful and said bonds were sold for a net price of eighty-five

cents on the dollar; that the proposition of sale included a bonus of fifty per cent. of the par value, that is to say, that a purchaser of a bond for $1,000 was entitled to have with said bond capital stock of said company at its par value, that is to say, that a purchaser of a bond for $1,000 was entitled to have with said bond capital stock of said company in the sum of five hundred dollars; and that thereupon the arrangement was made, in pursuance and as a part of the combination hereinbefore alleged, by the said board of directors and the said stockholders of said company with themselves whereby said fifty per cent., a bonus of stock, was furnished to said company to fulfill the aforesaid contract for the sale of said bonds, the said directors and stockholders as aforesaid furnishing said capital stock to said company as aforesaid at fifty cents on the dollar of the face value thereof; that the money with which said directors and stockholders were paid on account of said stock was taken by them out of the proceeds of the sale of said bonds:

That said stock was furnished in the following sums by the following named persons, of whom the B. D. Harris first named is the defendant:

By B. D. Harris, 450 shares, par value	$45,000	00
G. D. Harris, 450 shares, par value	45,000	00
John Carlisle, 336 shares, par value	33,600	00
8 George W. Carlisle, 225 shares, par value	22,500	00
George S. Richardson, 39 shares, par value	3,900	00

That by this proceeding the sum of seventy-five thousand dollars ($75,000) out of the proceeds of the sale of said bonds and of the assets of said company *were* wrongfully abstracted by said directors and stockholders, which moneys were paid to the said persons above named, as follows, to wit:

To B. D. Harris, the defendant herein	$22,500	00
To G. D. Harris	22,500	00
To John Carlisle	16,800	00
To George S. Richardson	1,950	00
To George W. Carlisle	11,250	00

That the value of the said stock as aforesaid contributed was based upon the theory that the said company was paying dividends upon the said stock out of its net earnings, when in truth such was not the fact, but on the contrary said company was insolvent and could not carry on its business without the making of said loan and the sale of said bonds, and said stock was worthless and was sold to said company at the figure above mentioned, to wit, fifty cents on the dollar, for the sole purpose before mentioned, and thereafter said stock was transferred to the purchasers of said bonds in the proportion above mentioned.

That for some years prior to the said transaction, and thereafter up to the time of the appointment of the receiver hereinafter men-

tioned, of said plant and its property to pay its creditors, said defendant and the other before mentioned stockholders and directors of said company permitted John Carlisle. above mentioned, to manage the affairs of said corporation and its business as general manager and treasurer thereof without supervision upon their part and without exacting any bond of him, and permitted him
9 to make contracts in the name of the said company and in its business, but to credit himself with the profits thereof, and permitted and directed him to pay dividends on all of the shares of stock in said company, except those standing in the names of said John Carlisle and George W. Carlisle, his brother, and accordingly such dividends were paid by said John Carlisle to sundry persons, but the names of said persons and the amount paid to each of them are to your orator unknown, when, in fact, said company had not made any profits and was unable to pay dividends and the money therefor had to be borrowed and has never been repaid out of the earnings of said company; that by reason of the negligence of said directors and their inattention to its business and by reason of the fact that said directors left the sole management of the business of said company in the hands of said John W. Carlisle, without giving the affairs of said company any attention whatever, the said John Carlisle, who was manager and treasurer of said company, was permitted to appropriate to his own use ninety-one thousand dollars ($91,000) of the moneys of said company, which, by reason of said negligence and mismanagement the assets of said company have been rendered less valuable than they otherwise would have been by the sum of two hundred thousand dollars ($200,000) and the said John Carlisle and the said directors have, at all times since its inception managed the affairs of said corporation so negligently and in such an unbusinesslike manner that on or about the 12th day of September, 1892, one of its creditors was compelled to make application to the United States circuit court for the district of Kentucky in a cause on the docket of said court numbered 1799 and entitled S. Woodward, assignee of John Carlisle, against The Great Western Mining and Manufacturiug Company, *et al.*, wherein application was made for the appointment of a receiver of the property and franchises of the said company, for the purpose of realizing its
10 assets and distributing them among the creditors of said company; that in said proceedings all of the property of the said Great Western Mining and Manufacturing Company *were* appraised and sold, and *were* found to be of the value of only $75,666.66, so that it left a large floating indebtedness of the said company of about $90,000 outstanding besides a large balance upon the bonded indebtedness of the said company aggregating about $270,000.

And your orator alleges that at the times of the several issues of capital stock aforesaid its property and plant were *not* worth more than the amount of its indebtedness existing at the respective times of the issue aforesaid, so that all of the issues of stock after the first

issue thereof were, fictitious, fraudulent, illegal and void, and by the mismanagement of the said directors a large indebtedness has been incurred fraudulently, which remains unpaid.

That in said proceedings in the United States circuit court for the district of Kentucky, L. C. Black, of Cincinnati, State of Ohio, a citizen of the State of Ohio, was appointed receiver of the assets of your orator for the purpose of realizing upon the same for the benefit of its creditors, and by special order of said United States circuit court for the district of Kentucky, he has been directed to prosecute this suit either in his own name or the name of your orator, as may be proper.

That the matters and things set forth in this bill were not discovered until the month of March, A. D. 1894, when the said receiver examined the books and papers of said company, and that said discovery was not before made for the reason that the said defendant and the other said directors and stockholders of said company remained in charge of said company, its books and papers until the appointment of a receiver as herein mentioned.

Wherefore your orator prays that this court will issue its writ of subpœna to the above-named defendant, B. D. Harris, directing him to make full answer to the charges and allegations of the
11 foregoing bill, according to the rules of this court, this complainant, however, expressly waiving answer under oath.

And your orator further prays that process may issue to make the said G. D. Harris, John Carlisle, and George S. Richardson parties to this bill, and to make answer thereto, if they should come within the jurisdiction of the court; but as to them, also your orator expressly waives answer under oath.

Your orator further prays that upon the coming in of said answer the court will enquire of the matters and things stated in said bill and will direct that an account thereof be taken, and will, upon final hearing, decree that the defendant, or defendants if more shall have come within the jurisdiction of this court, pay to your orator such sums as may by this honorable court be found to be due from said defendant, or defendants, by reason of the matters and things herein alleged, and for such other and further relief as your orator may be in equity entitled to.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY,
By L. C. BLACK, *Its Receiver*,
By DILLINGHAM, HUSE & HOLLAND,
Plaintiff's Solicitors.

DILLINGHAM, HUSE & HOLLAND,
Solicitors and Counsel for Plaintiff.

And afterwards, and on the same 8th day of July, A. D. 1895, a subpœna was issued in said cause; which said subpœna and the officer's return thereon, is in the words and figures following:

The President of the United States of America to B. D. Harris, of Brattleboro, Vermont, and a citizen of the State of Vermont:

You are hereby commanded that you and each of you per-
12 sonally appear before the judges of the circuit court of the United States for the district of Vermont, in the second circuit, at Burlington, in said district, on the 5th day of August, 1895, at ten o'clock a. m., to answer to a bill of complaint exhibited against you in the said court by the Great Western Mining and Manufacturing Company, a corporation duly organized and doing business under the laws of the State of Kentucky and a citizen of said State of Kentucky, and further to do and receive whatever said court shall have considered in that behalf; and this you are by no means to omit.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of Burlington, in said Vermont district, the 8th day of July, in the year of our Lord, one thousand eight hundred and ninety five, and of the Independence of the United States the one hundred and twentieth.

[L. S.] GEORGE E. JOHNSON, *Clerk.*

DILLINGHAM, HUSE & HOLLAND,
Solicitors for Orator.

UNITED STATES OF AMERICA, *District of Vermont,* } ss:

To all persons to whom these presents shall come, Greeting:

Know ye, that reposing confidence in the integrity and ability of R. E. Gordin, of Brattleboro, Vt., in the district of Vermont, I have appointed and do hereby appoint him, thesaid R. E. Gordin, a deputy marshal of the United States for the district of Vermont, for the sole purpose of serving subpœna on B. D. Harris, of Brattleboro, to which this authorization is attached, and none other; and the said R. E. Gordin is hereby empowered to act in that capacity in the especial case above stated in conformity with the laws of the United States.

13 Given under my hand this 12th day of July, in the year of our Lord eighteen hundred and ninety-five.

EMONY S. HARRIS,
Marshal of the United States, District of Vermont.

UNITED STATES OF AMERICA, *District of Vermont,* } ss:

At Brattleboro, Vt., in said district, on the 13th day of July, A. D. 1895, I served this subpœna on the within named B. D. Harris, a true and attested copy of this subpœna, with this my return hereon thereon endorsed.

Fees	$2 00
Travel to return	8 70
	$10 70

Attest:

EMONY S. HARRIS,
U. S. Marshal,
By R. E. GORDIN,
Special Deputy.

(Endorsed:) Returned served August 3, 1895.—Geo. E. Johnson, clerk.

And afterwards, and on the 5th day of August, A. D. 1895, Haskins & Stoddard entered their appearance as solicitors for the defendant.

And afterwards, and at the October term, A. D. 1895, of said court, said cause was continued until February term, A. D. 1896, of said court.

And afterwards and on the 1st day of January, A. D. 1896, the defendant filed his answer in said cause, which said answer is in the words and figures following:

14 Circuit Court of the United States, District of Vermont.

THE GREAT WESTERN MINING AND MANUFACTURING Company, by L. C. Black, Its Receiver, Plaintiff,
vs.
B. D. HARRIS, Defendant.
} In Equity.

Answer.

The answer of B. D. Harris, defendant, to the bill of complaint of The Great Western Mining and Manufacturing Company, by L. C. Black, receiver, complainant, in the above entitled cause.

The defendant now, and all times hereafter, saving and reserving to himself all benefit and advantage of exception to the manifold errors, uncertainties and insufficiencies in the complainant's said bill of complaint contained, for answer thereto, or unto so much, and such parts thereof as he is advised — or are material for him to make answer unto says:

That he admits the "Great Western Mining and Manufacturing Company" was incorporated under a special act of the legislature of the State of Kentucky on the 18th of January, 1856, with a capital stock of three million dollars divided into thirty thousand shares of one hundred dollars each, and with the right to organize under said

act when one thousand shares had been subscribed, "for all
15 purposes of mining coal, iron ore and other minerals, and manufacturing the same into any and all such forms, for all such uses and purposes as the said company may deem for their advantage; boring for and manufacturing salt, and doing all things properly connected therewith; building barges, steamboats, ships, vessels and other water craft, and manufacturing and constructing all articles and things out of wood and lumber in any and every form, with or without iron or other materials in connection therewith; clearing up and cultivating the lands of the said company in such manner and for such purposes as the said company shall deem for their advantage, and manufacturing the products thereof, building all such buildings, and making all such improvements upon their lands as may be desirable in establishing and conducting the several kinds of business and doing all things properly belonging to or connected with the said transportation, sale, or other disposition thereof."

And further admits that the capital stock of said company was divided into 2,000 shares of one hundred dollars each; that the defendant on the 10th day of November, 1887, was the owner of six hundred shares, and the remainder of said capital stock was owned by the persons and in the amount as is set forth in said bill of complaint.

And further admits that on the 11th day of January, 1888, the capital stock of said company was increased in the sum of $50,000 and the shares were divided among the shareholders as is set forth in said bill of complaint. That on the 22d day of April, 1889, the capital stock of said company was further increased in the sum of one hundred thousand dollars and the additional one thousand shares were distributed to the stockholders as is set forth in said bill of complaint.

The defendant, further answering, denies that said additional stock, or any portion thereof, was issued and distributed for the purpose of defrauding said company, and obtaining without consideration the aforesaid shares of the capital stock of said
16 company, and denies that it was issued for the purpose of selling the same to said company, and for the purpose of defrauding said company out of the proceeds of any loan negotiated, or to be negotiated, for its benefit,

And the defendant further answering avers that the real estate of said corporation consisted of four thousand acres of land owned in fee simple, and the mining and mineral rights in two thousand additional acres, situated in Lawrence county, Kentucky, and that upon this land there are extensive and valuable coal beds, known as the Peach Orchard coal, which was being worked when said defendant became a stockholder in said company in December, 1883.

And the said defendant further avers that previous to and at the times of the stock issues as aforesaid, the stockholders of said company believed, from the superior quality of the coal mined, the

extensive beds examined, the value thereof as estimated by competent experts and skillful mining engineers, together with the favorable location of said coal, and its demand in the market and ready sale, that the property of said company greatly exceeded in value the face amount of its then issued stock and indebtedness; said stockholders believe, inasmuch as they were the sole owners of the property, subject only to the existing indebtedness, that they had the legal right by unanimous action, regardless of net earnings expended in betterments, to increase said capital stock to an amount more nearly approximating the considered and apparent true value of the property, and to divide such increase amongst themselves *pro rata*, provided no creditor of the company should be injured thereby. And the defendant avers that no debt against said company, existing at the time of these stock issues, or either of them, is now outstanding, or was outstanding when this suit was commenced, but the same were all paid fully.

17 And the defendant further avers upon this information and belief that between January 1st and May 30, 1889, there were large yearly expenditures from the net earnings for betterments, aggregating an amount amply sufficient in and of themselves to justify the issue of stock as aforesaid, as stock dividends.

And the defendant further avers that the stockholders thought it advisable to develop and largely increase the output of their mines and to purchase additional machinery and appliances for this purpose and that upon the 22d of April, 1889, they voted to negotiate a loan of $300,000 to issue 300 mortgage bonds of $1,000, each payable in twenty years, and to secure the payment thereof by executing to the Mercantile Trust and Deposit Company of Baltimore, Maryland, a first mortgage, or deed of trust, covering all the property of said company, and John Carlisle, treasurer of the company, was chosen agent to negotiate said loan.

And this defendant, upon information and belief, avers that pursuant to this vote, John Carlisle arranged with Elliot Johnson & Co. of Wilmington, Delaware, to procure said loan and to sell said mortgage bonds, to be secured as aforesaid.

That the said Elliot Johnson & Co. selected Prof. A. G. Wetherby, an experienced mining engineer and skillful geologist, to examine the property of said company and make a report thereon to them.

That said Wetherby made a careful examination of said property, and on the 6th day of May, 1889, made a full report which was published and placed in the hands of the persons who subsequently became purchasers of the bonds. That said report truly stated the amount of land owned, the mining rights, the improvements made by said company, and contained an estimate of its resources and coal supply. The improvements made were classified in said report under several items, the cost thereof carried out, and the same amounted, without including the working store capital of $7,000, to

\$163,200, and that the purchasers of said bonds in making
18 said loan relied for security upon the mortgage of the property of said company.

And this defendant upon information and belief avers that pending the negotiation and sale of said bonds, the said Elliot Johnson & Co. reported that said bonds could be more readily and advantageously sold, provided stock of the company to the extent of fifty per cent. of the par value of said bonds should be issued to the purchasers thereof.

And that on the 13th day of May, 1889, said proposition was considered by said company and the stockholders decided not to issue any new stock of the company for this purpose, but in order to facilitate the making of said loan an agreement was made under which each and every stockholder offered to sell to the purchasers of said bonds his *pro rata* shares of stock at fifty cents on the dollar of the par value thereof, and the said John Carlisle, secretary of said company, was chosen agent by said stockholders, to act for them in the proposed sale, and in the collection of the purchase money.

That the bonds and stock were afterwards sold pursuant to this arrangement, and this defendant received for the 450 *pro rata* shares furnished and sold by him the sum of \$22,500. And admits upon information and belief that the other stockholders received from the sale of their *pro rata* shares of stock the several sums stated in said bill of complaints.

But defendant denies that any stock was sold to said company, and denies that said company paid for said stock. The payment for said stock was made by the purchasers of said bonds through John Carlisle, who was the agent of the company, and also agent for the stockholders individually, the company receiving sixty cents net on the dollar for its bonds and the stockholders receiving fifty cents on the dollar for their stock.

And the defendant denies any and all combination and conspiracy of the stockholders, and any and all combination and con-
19 spiracy of himself with the other stockholders to defraud said company or to abstract from the assets of said company money or property for his or their own use and benefit, and denies that said stock was issued for such purpose or for the purposes set forth in said complaint, but avers that the same was lawfully issued as hereinbefore set forth.

And said defendant avers that he and his brother, G. D. Harris, were the largest stockholders of said company, and as such were requested to furnish all the stock (1,500 shares) required to be sold with said mortgage bonds at fifty dollars a share, which they positively declined to do, fully believing said stock to be intrinsically worth much more than that price.

And the defendant, so far as he has personal knowledge, and upon information and belief, denies that said company was insolvent at the time of said stock issues or at the time said loan was negotiated, and denies that dividends were paid when said company

was insolvent, but avers that said dividends were paid from the net earnings of said company.

And further answering, admits that John Carlisle, of Cincinnati, Ohio, was annually chosen by the directors treasurer and general manager of said company during all the time the defendant was stockholder and director, and avers that said Carlisle had been for many years connected with said company and largely interested therein as a stockholder; that he possessed ample means, and had a large and extensive business experience, in addition to his intimate knowledge and acquaintance of the business affairs of said company, and that his reputation for strict integrity and business capacity was unquestioned.

And this defendant at the various times said Carlisle was chosen treasurer and general manager believed, and now believes, so far as he has knowledge, that no person more competent could have been chosen to have in charge the general management of the business of said company.

And further answering denies that he gave no attention to
20 the affairs of said company; denies that said John Carlisle was directed to pay dividends to all of the stockholders, except to himself and his brother, Geo. W. Carlisle, but avers that dividends were voted by the directors to be paid from the net earnings of the company as aforesaid; that this defendant received his dividends and supposed the other stockholders received theirs, until he obtained a copy of said bill of complaint.

And the defendant further avers that he and his brother, G. D. Harris, owned three-fifths of all the stock of said company, and that John Carlisle and his brother, George W., owned more than nine-tenths of the remainder, the four owning more than $\frac{34}{35}$ of all said stock. That this defendant, though having unlimited confidence in the business capacity and honesty of said John Carlisle, did, on account of his official connection with said company, and in view of his large financial interest therein, give to the affairs of said company all the personal attention necessary to faithfully discharge his official duties as president and director, and denies that said company sustained or suffered any loss by reason of any negligence on his part, or by the negligence, so far as he has knowledge, of the other directors. And this defendant specifically denies all and singular, the allegations of said bill, charging upon him, either directly or indirectly, any fraud, neglect or misconduct of any kind whatever, in connection with the business of said company.

And this defendant so far as he has knowledge, and upon information and belief, denies that said John Carlisle made contracts in the name of the company, and misappropriated the profits accruing therefrom to himself; and likewise denies that said Carlisle misappropriated $91,000 of the money of said company, or any other sum, and denies that the assets of said company, by reason of negligence and mismanagement, have been rendered less valuable by $200,000, or in any other sum, and denies that the affairs of said

corporation were managed so negligently and in such an
21 unbusinesslike manner that on about the 12th of September, 1892, one of the directors was compelled to make application to the United States circuit court for the district of Kentucky for the appointment of a receiver for the purpose of closing the affairs of said company.

And on the contrary, said defendant upon information and belief avers that in view of the great depression in business, the great shrinkage of values and the difficulty of procuring ready money, the affairs of said company were in fair condition, and far better than many plants and enterprises in the country.

And likewise avers upon information and belief that John Carlisle on or about the 12th of September, 1892, had become so involved and financially embarrassed in his private business affairs and property interests, that upon his, the said Carlisle's, request, the said Woodward made said application to said United States district court for the district of Kentucky, for the appointment of a receiver, with the hope and expectation on the part of said John Carlisle of protecting and saving his own interests, and that of the stockholders, by having the affairs managed for a time under a receiver appointed by said court; and admits that upon said petition L. C. Black was appointed receiver on or about September 12, 1892.

And said defendant upon information and belief avers that said receiver allowed the business and work of said company to continue for a time under the efficient charge of W. S. Howells, the then general superintendent, and that on or about the first of January, 1893, said receiver made a statement which was published by Eliot, Johnson & Co., acting for the bondholders, which statement showed the net earnings during the three months next succeeding the appointment of said receiver was about $7,000; that afterwards, just when this defendant is unable to state, said Howells was discharged by said receiver, and from that time the business was mismanaged, losses were sustained, and the property of said company was greatly injured, and rendered less salable.

And said defendant further states that he has no knowledge except common report of the sale of the property of the Great Western Mining and Manufacturing Company for the sum of $75,666.66, aside from the allegation in said complaint, which he presumes may be true, but upon information and belief he alleges that such sale was made, if at all, subject virtually to the mortgage indebtedness, it being well known at the time that the bondholders has formed a syndicate to buy in the property, and that no bids from parties outside said syndicate for a sum not exceeding said indebtedness would avail. And the defendant upon information and belief avers that said syndicate did buy in the property as prearranged and did subsequently incorporate and reorganize it with precisely the same amount of stock and bonds outstanding previous to said sale, viz.:

$350,000 stock, and $300,000 bonds, thereby expressing, if acting in good faith, their honest estimate of the true value of said property, notwithstanding said sale at the low price aforesaid.

And this defendant further answering upon information and belief avers that said receiver afterwards filed his account in said court and an order of distribution of said estate was made by said circuit court on the 29th of March, 1894.

That afterwards, on the 22d day of January, 1895, said receiver filed a statement in said court setting forth in substance that he had ascertained from the books of said company that certain stockholders and officers thereof had combined to obtain, and did obtain for themselves, $75,000, which should have been paid into the treasury of said company; and that he, the said receiver, had been informed and believed that $150,000 of stock had been issued without consideration, as a device to obtain money from said company, and also that by reason of inattention and negligence upon the part
23 of the directors, and by reason of the mismanagement and misappropriation of funds, said company had — and was greatly damaged, and that he believed said company had a valid claim against said stockholders and directors therefor, and that proceedings should be commenced to recover the same.

That on the same 22d of January, 1895, upon the filing of said statement, an order was made by said circuit court directing said receiver to proceed to recover said moneys in his own name as receiver or in the name of said company.

And this defendant, upon information and belief, avers that the books and papers of said company were turned over to said receiver in September, 1892, and that he has had exclusive possession thereof since that time, and denies that said receiver was in any way or manner delayed from making an examination of said books and papers by said company, or by reason of its officers having or retaining possession of the same, but avers that said receiver had ample opportunity to examine said books and papers touching all matters set forth in said bill of complaint long before the settlement of his supposed final account in March, 1894, and long before the filing of his petition in January, 1895, for leave to institute this suit.

And said defendant further avers that there is now no debt which existed at the time of the issue of said stock, or at the time the sale of said stock and bonds was authorized, and that every then stockholder and director of said company approved and assented to each and all the transactions relating to the issues of said stock, the sale thereof and the negotiation of sale of said bonds; that said directors acted in good faith, using all reasonable care and diligence in the management of the affairs of said company, and that no losses were sustained by the negligence of this defendant, nor, so far as he has knowledge, by the negligence or want of supervision of any of the directors.

All which matters and things the defendant is ready to
24 aver, maintain and prove, as this honorable court shall direct, and he hereby prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

B. D. HARRIS,
Defendant's Solicitor.

HASKINS & STODDARD.

And afterwards, and on the 12th day of February, A. D. 1895, the orator filed its replication to defendant's answer in said cause, which is in the words and figures following:

The Circuit Court of the United States in and for the District of Vermont.

THE GREAT WESTERN MINING AND MANUFACTURING Company, by L. C. Black, its Receiver, Plaintiff,
v.
B. D. HARRIS, Defendant.
} In Equity. No. —.

Plaintiff's Replication.

This repliant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant for the replication, thereunto saith, that he doth and will aver, maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain,
25 evasive and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY,
By L. C. BLACK, *Its Receiver,*
By DILLINGHAM, HUSE & HOWLAND,
Plaintiff's Solicitor.

And afterwards, and at the February term, A. D. 1896, of said court, said cause was thereafter continued until the May term, A. D. 1896, and was further continued from term to term until the May term, A. D. 1897, of said court.

And afterwards, and at said May term, A. D. 1897, said cause was continued until the October term, A. D. 1897, of said court.

And afterwards, and on the 15th day of June, A. D. 1897, the orator filed its cost bond in said cause, which said bond is in the words and figures following:

Know all men by these presents: That I, Charles H. Shipman, of Montpelier, in the county of Washington, in the State of Vermont, am holden and stand firmly bound unto B. D. Harris, of Brattleboro, in the county of Windham and State of Vermont, in the sum of two hundred & fifty ($250.00) dollars, current money of the United States, for the payment of which well and truly to be made to the said B. D. Harris, his heirs and assigns, I bind myself, my heirs, executors and administrators, firmly by these presents.

26 Signed with my hand, and sealed, with my seal, this seventh day of June, 1897.

The condition of this obligation is such, that if the Great Western Mining and Manufacturing Company shall pay or cause to be paid, all legal costs which may be adjudged against said company in a suit by it instituted against the above obligee before the circuit court of the second circuit of the United States, at their term, begun and held at Rutland within and for the district of Vermont, on the first day of October, 1895, the above obligation to be void, otherwise of force.

CHAS. H. SHIPMAN.

Sealed and delivered in presence of—

W. P. DILLINGHAM.

And afterwards, and at the October term A. D. 1897, said cause was continued until the February term A. D. 1898, and was further continued from term to term until the October term A. D. 1898 of said court.

And afterwards at the October term A. D. 1898, said cause was continued until the February term A. D. 1899, of said court.

And afterwards, and on the 4th day of October A. D. 1898, Waterman & Martin entered and appeared as solicitors for the defendant.

And afterwards, and on the 4th day of October A. D. 1898, the deposition of Henry P. Scott was filed in said cause, which said deposition is in the words and figures following:

The President of the United States of America to Charles G. Guyler, of Wilmington, Delaware, Greeting:

Know ye, that we, in confidence of your prudence and fidelity, have appointed you a special examiner, and by these presents do

give you full power and authority diligently to examine
27 upon his corporal oath, before you to be taken, at Wilmington, Delaware, a witness to be produced on the part of the orator, in a certain case now pending undetermined in the circuit court of the United States of America for the district of Vermont, in the second circuit, wherein The Great Western Mining and Manufacturing Company is orator and B. D. Harris is defendant, touching the premises.

And we do hereby require you, before whom such testimony may be taken, to reduce the same to writing, and to close it up under your hand and seal, directed to Geo. E. Johnson, clerk United States circuit court, district of Vermont, at Burlington, Vermont; and that you return the same when executed as above directed, annexed to this writ, with the title of the cause endorsed on the envelope of the commission, into the said circuit court, before the judge thereof, with all convenient speed.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of Burlington, in said district of Vermont, this 4th day of August, A. D. 1898, and of the Independence of the United States the one hundred and twenty-third.

[L. S.] GEO. E. JOHNSON, *Clerk.*

28 In the Circuit Court of the United States for the District of Vermont.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY
vs.
B. D. HARRIS.

Testimony on behalf of the complainant, taken on the seventh day of September, A. D. eighteen hundred and ninety-eight, at No. 826 Market street, Wilmington, Delaware, before Charles G. Guyer, Esq., special examiner.

Present: L. C. Black, Esq., counsel for complainant.
No counsel appearing for defendants.
Chas. G. Guyer, Esq., special examiner.

Mr. Black, counsel for the complainant, states that on the twenty-seventh day of August, A. D. 1898, he addressed a notification to Mr. Reuben Tyler at the Carlisle building, Cincinnati, Ohio, advising said Reuben Tyler, as counsel for the defendants herein, that on Wednesday, the seventh day of September, A. D. 1898, the complainant would proceed to take certain testimony in the above entitled action at the offices of Mr. Charles G. Guyer, special examiner, No. 826 Market street, Wilmington, Delaware, at ten o'clock a. m., nd that said notification was duly stamped and posted.

29 HENRY P. SCOTT, a witness, being produced and duly sworn on behalf of the complainant, deposes and says as follows:

By Mr. BLACK:

Q. Please state your place of residence and your occupation?

A. My residence is Wilmington, Delaware. My occupation is that of a banker and broker.

Q. What was your occupation in the years 1888, 1889 and 1890?

A. Same occupation. I was a member of the firm of Elliott, Johnson & Company.

Q. Elliott, Johnson & Company of what place?

A. Wilmington, Delaware.

Q. Did you have any branch offices?

A. Not at that time.

Q. Who composed the firm of Elliott, Johnson & Company in the year 1889?

A. Alfred S. Elliott and myself.

Q. Are you personally acquainted with John Carlisle, of Cincinnati, Ohio?

A. I am.

Q. And with B. D. Harris, of Vermont?

A. I have met him; yes.

Q. And with Mr. J. D. Harris, of New Hampshire?

A. No.

Q. State what, if any, business transaction your firm of Elliott, Johnson & Company had at any time with the Great Western Mining and Manufacturing Company of Peach Orchard, Kentucky?

A. Early in 1889 Mr. John Carlisle, as the treasurer of the Great Western Mining and Manufacturing Company, applied to the Penn Mutual Life Insurance Company of Philadelphia for a loan, and the president of the Penn Mutual Life Insurance Company, not deeming such a loan suited to their investment, suggested that——

Q. Applied for a loan? A loan for whom, or for what?

30 A. He applied for a loan——

Q. You cannot say whether upon his individual property or other property at that time?

A. I am not sure. He applied for a loan, and the president of the Penn Mutual Life Insurance Company deeming that the business was more suited to private investors than for a public corporation, sent for a member of our firm to meet Mr. Carlisle, and I kept the appointment. Mr. Carlisle told me of the assets and prospects and financial condition of the Great Western Mining and Manufacturing Company; that it had a mortgage debt of sixty thousand dollars, if I remember correctly, and some floating debt, and that he wanted to raise a considerable larger sum, the balance of the money to be used in the furnishing of additional facilities for mining of coal and extending of their business.

Q. Was the loan which Mr. Carlisle asked you to float to be a loan

upon the property and assets of the Great Western Mining and Manufacturing Company.

A. It was.

Q. Did Mr. Carlisle represent to you what connection or relation he had with that company?

A. Mr. Carlisle represented himself to be the treasurer of that company.

Q. And was there anything said about who the manager was, that is, in whose hands was the management of that company?

A. My recollection is that he was the manager of the entire property.

Q. After the first interview with Mr. Carlisle in reference to this matter, what course did the business take?

A. We had many interviews over it. The matter attracted us. It seemed to be a property of considerable value, from the data which he gave us, and the coal of good quality, with a market considerably larger than their output. It seemed to be a good business operation to furnish them with additional capital, sufficient
31 to develop a very much larger coal output. The result of the negotiations was a proposition which we made to him that we would attempt to dispose of bonds to an amount of three hundred thousand dollars, provided they were accompanied with fifty per cent. or one hundred and fifty thousand dollars' worth of stock.

Q. What was the amount of the loan proposed?

A. My recollection is that the amount first proposed was somewhat less than three hundred thousand dollars, but after various consultations we agreed upon that amount as being a very desirable one to make a first-class business operation of it, giving the additional facilities to an extent which would make it a company worth dealing with.

Q. And finally the amount——

A. And finally the amount to be floated was determined upon as being three hundred thousand dollars, we stating to Mr. Carlisle that, in our judgment, bonds on a coal company could not be floated among our clients unless accompanied with a stock bonus, and we finally suggested and they agreed to furnish one hundred and fifty thousand dollars of stock with the three hundred thousand dollars of bonds.

Q. You say "they agreed." Whom do you refer to?

A. Mr. Carlisle represented the Great Western Mining and Manufacturing Company.

Q. The company were to furnish for each bond fifty per cent. of its capital stock as a bonus?

A. Yes.

Q. State what was represented to you by Mr. Carlisle on behalf of the Great Western Mining and Manufacturing Company, as to the liabilities of the company, and its needs in the way of further lia-

bilities of the company, and its needs in the way of further facilities or further capital?

A. He stated that the company had a mortgage indebtedness of sixty thousand dollars and a floating indebtedness of an amount in addition which I do not remember, but my recollection is
32 that it certainly was not over thirty to fifty thousand dollars; that the additional amounts of money to be derived from the sale of the bonds and stock were to be put into additional facilities for the mining and developing of the coal property. He furnished us with many letters from people in the Cincinnati locality who were using the coal, of the tenor that it was a steaming coal of rare quality and that if they could get larger amounts of it they would be glad to do so, showing a market for a very much larger output than the company had at any time it was presented to us.

Q. Was there anything said, or anything embraced in your proposition to undertake to float this loan, with reference to the use to which the additional capital, after paying off the certain liabilities, was to be put?

A. All of the proceeds of the loan, from the sale of the bonds, we were emphatic upon asking and their agreeing, after the paying of whatever floating debt there was, should be put into the property as additional facilities or improvements, or additional value for the bonds.

Q. Who carried on, on behalf of the Great Western Mining and Manufacturing Company, these negotiations for the floating of the bonds with you?

A. John Carlisle.

Q. Did you have interviews with, or communications or data from parties other than Carlisle representing that company?

A. None whatever, my recollection is, until after the terms had been agreed upon and the investigation was made and then I met Mr. D. B. Harris once in New York and once in Philadelphia.

Q. Did you meet him prior to the final closing of the negotiations, or after they were closed?

A. Subsequent to the closing of the negotiations, and my recollection is that there was no conversation with him except of a general nature, and particularly referring to a request we had made, that the company, or several of the individuals associated
33 with the company, should form a small pool to support the securities to be sold after they were listed on the Baltimore stock exchange.

Q. Can you recall the time and place and the circumstances of the argument or demand upon your part, that the entire surplus of the proceeds of the bonds should be put into the assets and facilities of that company?

A. We probably *about talked* it many times and places——

Q. Between whom?

A. Between Mr. Carlisle and myself.

Q. On the part of Elliott, Johnson & Company, who had charge of the negotiations?

A. I had.

Q. Had you sole charge?

A. Practically so. Mr. Elliott advised with me, and he may have had some talk with Mr. Carlisle about the matter, but it was practically in my care.

Q. You said many times you had talks upon that matter?

A. Mr. Carlisle was in Wilmington several times, and I had met him also in Philadelphia and New York. I remember one particular time in Philadelphia at the temporary offices of the Penn Mutual Life Insurance Company on Walnut street, when I said to him definitely that we would not attempt to float the bonds without they were accompanied by a stock bonus, and also that *whether* money the bonds furnished, after paying off the company's obligations, should be the property of the company for improvements, developments, &c.

Q. And what reply was made on the part of Mr. Carlisle?

A. I do not know whether he assented to it there or not, or consulted with his people and afterwards assented, but they did assent to it.

Q. It was assented to on behalf of the company?

A. On behalf of the company, and the bonds were finally offered with that understanding.

Q. What particular reason, Mr. Scott, did you have for
34 making the demand that the surplus should be invested in increased facilities and in improvements for the company?

A. My particular reason for demanding that whatever moneys the bonds furnished, after the payment of the company's debts, should be put into the property, was to increase the value of the property as much as possible in order to thereby further secure the bonds.

Q. Did Mr. Carlisle, at any time during these negotations, state what increased facilities were necessary and that they contemplated making?

A. At many times Mr. Carlisle so stated. I do not remember in detail now what they were, but the general feeling I had was that the output was to be enormously increased.

Q. You cannot recall the particular items of improvement that were to be made?

A. I cannot recall them, but they were items connected with the proper extension of the output and development of the company's business.

Q. Were papers, documents, &c., submitted to you on behalf of the Great Western Mining and Manufacturing Co.?

A. Covering what?

Q. Covering this issue of bonds; form of the data, the legal papers and the proceedings, &c.?

A. They probably were, but I do not remember just what papers

now. The legal papers we referred to our counsel, Mr. Samuel R. Huey, of Philadelphia, and he passed upon them.

Q. That part you undertook to make no supervision of whatever, personally?

A. Except the ordinary casual one of a business man. We relied upon our legal adviser.

Q. Was anything said by Mr. Carlisle, or any representative of the Great Western Mining and Manufacturing Company, as to the source from which would come this bonus; the fifty per cent. of stock which was to accompany the bonds?

35 A. Yes. I made very careful inquiries, desiring that the stock should be issued as full paid and properly issued. Mr. Carlisle stated to me that they could increase their capital by the one hundred and fifty thousand dollars desired, very readily, because the surplus earnings of the company, properly belonging to the stockholders, for many years, had been put back into the company for betterments, and that stock could be properly and legally issued is lieu of such expenditure.

Q. And was anything said as to who was to contribute this stock in the sale of the bonds, whether it was company, stockholder, or otherwise?

A. I have no recollection of the legal means that were to be employed in getting the stock out properly, but it was to be stock that belonged to the company, and we were not buying bonds or stock alone, but both.

Q. For whom?

A. From the company.

Q. Was anything said to you by Mr. Carlisle, or any other representative of the company, about the fact that these stockholders were selling, or were to sell this stock, one hundred and fifty thousand dollars' worth to the company, or that the company were to pay the stockholders therefor?

A. I do not know how they proposed to get it out, whether it was to be issued as dividends and then given by the stockholders to the company or not; but I never had the slightest notion that a dollar of the proceeds of the bonds was to be taken out of the company for any individual's use. Every penny, according to our understanding, was to be left for the company uses after the payment of the debts of the company.

Q. Was there a written contract made between the firm of Elliott, Johnson & Company and the Great Western Mining and Manufacturing Company concerning the floating of this loan?

A. My recollection is that we made a proposition to them by letter, which they accepted.

36 Q. The correspondence to which you refer was held at about what time?

A. April, 1889.

Q. In your proposition to the Great Western Mining and Manufacturing Company for the floating of these bonds, you stated that

fifty per cent. of the stock of the company should accompany the bonds sold without stating the particulars as to from whom that stock was to come, or by whom it was to be contributed. What was the fact?

A. The fact was, from the bargain made, that we were to have the right to buy from the company, at a stated price, a thousand dollar bond and five hundred dollars' worth of stock. Our entire transaction in the matter was with a representative of the Great Western Mining and Manufacturing Company.

Q. And the transaction was with whom?

A. John Carlisle, treasurer of the company.

Q. Treasurer of the company; acting in what capacity with reference to this transaction?

A. As treasurer.

Q. And as representative of the company?

A. As representative of the company; as treasurer.

Q. Did you float these bonds?

A. We floated them all.

Q. The amount being what?

A. Three hundred thousand dollars' worth of bonds and one hundred and fifty thousand dollars' worth of stock.

Q. Representing to the Great Western Mining and Manufacturing Company what sum of money?

A. Two hundred and fifty-five thousand dollars.

Q. To whom did you remit the proceeds of these bonds, or did your firm remit?

A. Our firm remitted for them, as they were sold, to John Carlisle, the treasurer of that company.

Q The treasurer of the Great Western Mining and Manufacturing Company?

37 A. The treasurer of the Great Western Mining and Manufacturing Company.

Q. What was the mode of remitting?

A. I do not remember.

Q. I mean as to whether it was all remitted in one sum, or whether in several amounts?

A. Remitted in very many sums. As we would sell a few bonds, or a block of them, we would send the proceeds.

Q. And was there any dividing of the remittance as between the stock and the bonds?

A. No. Each time we made a sale we remitted for the bonds and stock together, it being one transaction.

Q. One single transaction?

A. Yes.

Q. When did it first come to your knowledge that any part of the proceeds of the bonds had been paid the stockholders for their contributions to stock to the company?

A. In the fall of 1892 I was informed that the Great Western Mining and Manufacturing Company had been placed in the hands

of a receiver, and I went to Cincinnati, very much surprised, to investigate the matter. Through the investigation then started, running through a year and a half, we ascertained that a large amount of the money furnished as proceeds for the bonds had been diverted from the company purposes to certain individuals.

Q. Do you remember the manner in which that information was obtained? Can you recall any of those particulars?

A. I cannot, except that I think I was first informed of it in Cincinnati on a subsequent visit, when in company with several gentlemen, and we were attempting to reorganize the property.

Q. Can you remember who first mentioned to you that fact?

A. I am confident that Mr. L. C. Black did, the receiver of the company.

38 Q. What action, if any, did you take upon receipt of the information?

A. I called upon John Carlisle and accused him of it in his office in Cincinnati.

HENRY P. SCOTT.

The above deposition having been held open by me from the date of the same, to wit, the seventh day of September, A. D. 1898, for the purpose of cross-examination of the witness on the part of the defendant, the attached letter was received from Reuben Tyler, Esq., counsel for the defendant, to the effect that no cross-examination was desired.

CHARLES G. GUYER,
Special Examiner.

Received of L. C. Black, receiver, the sum of fifteen dollars for services as special examiner in the above entitled cause.

Sept. 21, 1898.

CHARLES G. GUYER.

Office of Reuben Tyler, attorney at law, S. W. cor. Fourth & Walnut, room 14, Carlisle building.

Telephone 690.

CINCINNATI, *September 14th*, 1898.

L. C. Black, Esq., Cincinnati, Ohio.

DEAR SIR: I have read the testimony of Mr. Scott, taken in Wilmington in behalf of complainant in case against Mr. Harris, and do not wish to cross-examine the witness; so that the commissioner may close the deposition and forward same to the court.

Truly yours,

REUBEN TYLER.

CHAS. G. GUYER,
Special Examiner.

39 In the Circuit Court of the United States for the District of Vermont.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY
vs.
B. D. HARRIS.

STATE OF DELAWARE,
County of New Castle, City of Wilmington, } ss:

I, Charles G. Guyer, special examiner appointed to take testimony in the above entitled case, do hereby certify that, pursuant to the notice, of which a memorandum is given at the caption of this deposition, in the civil cause pending in the circuit court of the United States, in and for the district of Vermont, wherein The Great Western Mining and Manufacturing Company, by L. C. Black, its receiver, is complainant, and B. D. Harris, is defendant, I was attended at my office, No. 826 Market street, Wilmington, Delaware, by L. C. Black, counsel for complainant, no counsel appearing for the defendant, on the aforesaid day, to wit, 10 o'clock a. m., September 7, A. D. 1898; that the aforenamed witness, Henry P. Scott, who is of sound mind and lawful age, *and* by me first carefully examined, cautioned and duly sworn to testify to the truth, the whole truth and nothing but the truth, and that he thereupon testified as is above shown; that the deposition was reduced to writing by
40 me, to wit, in stenographic notes, in the presence of the witness himself; that said deposition, after the transcription thereof, was carefully read by said witness and approved by him as correct; that said deposition was held open for recall of said witness and cross-examination of him by the defendant, or his counsel, from the seventh day of September, A. D. 1898, until this date, at which time the aforenamed notification was received that said defendant did not desire to cross-examine said witness; that I am neither counsel nor attorney for either of the parties in said suit, nor interested in the event of said cause in any way; that it is impracticable for me to deliver said deposition into the hands of the court and that the same is duly sealed and mailed for transmission to the clerk of said court, there to remain under my seal until opened.

Witness my hand and seal as such special examiner, at Wilmington, on this twenty-first day of September, A. D. 1898.

[SEAL.] CHARLES GUYER,
Special Examiner.

And afterwards, and at the February term, A. D. 1899, said cause was continued until the May term, A. D. 1899, of said court.

And afterwards, and on the 28th day of February, A. D. 1899, the death of the defendant was suggested.

And afterwards, and at the May term, A. D. 1899, said cause was continued until the October term, A. D. 1899, of said court:

And afterwards, and on the 10th day of June, A. D. 1899, the orator brought its bill of revivor against Sarah B. Harris, Charles A. Harris and Henry H. Hollister, defendants; which said bill of revivor is in the words and figures following:

41 Circuit Court of the United States in and for the District of Vermont.

GREAT WESTERN MINING AND MANUFACTURING Company, by L. C. Black, Its Receiver, Plaintiff,
v.
SARAH B. HARRIS, CHARLES A. HARRIS, and Henry H. Hollister, Defendants.
} In Equity. No. —.

Bill of Revivor.

To the judges of the circuit court of the United States for the district of Vermont:

The Great Western Mining and Manufacturing Company, a citizen of Kentucky, by L. C. Black, its receiver, brings this its bill against Sarah B. Harris and Charles A. Harris of Brattleboro, Vermont, and citizens of the State of Vermont, and Henry H. Hollister, a citizen of New York, in the State of New York, and thereupon your orator complains and says:

That it is a corporation duly organized and doing business under the laws of the State of Kentucky, and that the said Sarah B. Harris and Charles A. Harris, defendants, are citizens of the State of Vermont; and that the said Henry H. Hollister is a citizen of the State of New York, and that the amount involved in this action is more than two thousand dollars exclusive of interest and costs.

42 That the plaintiff, The Great Western Mining and Manufacturing Company, by L. C. Black, its receiver, at the October term of said court, A. D. 1895, exhibited its original bill of complaint in this honorable court against B. D. Harris in Brattleboro, in the State of Vermont, as the defendant thereto, and praying that this court issue its writ of subpœna to the said B. D. Harris, directing him to make full answer to the charges and allegations of said bill of complaint according to the rules of this court, this complainant, however, expressly waiving answer under oath; and further praying that process might issue to make G. D. Harris, John Carlyle, George W. Carlyle and George S. Richardson, persons named in said bill of complaint, parties to the same, and to make answer thereto if they should come within the jurisdiction of the court, but as to them also your orator expressly waived answer under

oath; and further praying that at the coming in of said answers the court would inquire of the matters and things stated in said bill and would direct an account thereof to be taken, and would upon final hearing decree that the defendant or defendants, if more should have come within the jurisdiction of this court, pay to the orator such sums as might by this honorable court be found to be due to the plaintiff from the defendant or defendants by reason of the matters and things in said bill of complaint alleged, and for such other and further relief as the orator therein might be in equity entitled to.

And the plaintiff further shows to your honor that the said defendant B. D. Harris, having been duly served with a process for that purpose, appeared and put in his answer to said bill; that such proceedings have been had; that Charles G. Guyer, of Wilmington, Delaware, was appointed a special examiner by this court to take testimony in said cause in the State of Delaware in accordance with a stipulation on file, but the testimony has not yet been filed in said cause; and that the said defendant B. D. Harris lately and
43 on or about the 19th day of January, 1899, departed this life, having first made and published his last will and testament in writing; and that on the 25th day of February, A. D. 1899, by the consideration of the probate court for the district of Marlboro and State of Vermont, the said Sarah B. Harris and Charles A. Harris, of Brattleboro aforesaid, and the said Henry H. Hollister, of New York, in the State of New York aforesaid, were duly appointed executors thereof, and have given the bonds required by law and have become qualified to act as such, and have thereby become and now are proper legal personal representatives of the said defendant B. D. Harris, deceased.

And the plaintiff further shows that the said suit and proceedings have become abated by the death of the said defendant B. D. Harris, and the plaintiff is, as it is advised, entitled to have said suit and proceedings revived against the said Sarah B. Harris, Charles A. Harris and Henry H. Hollister, as executors of the last will and testament of the said B. D. Harris, deceased, and to have said cause put in the same plight and condition as the same was in previous to the abatement thereof by the death of the said B. D. Harris.

To the end therefore, that the said suit and proceedings, if such became abated as aforesaid, may stand revived and be in the same state or condition as the same were in at the time of the death of said B. D. Harris or that the defendants hereto may show good cause to the contrary, may it please your honor to grant to the plaintiff a writ of subpœna to revive, issuing out of this court to be directed to the said Sarah B. Harris, Charles A. Harris and Henry H. Hollister, thereby commanding them at a certain day and under a certain penalty to be therein limited, personally to be and appear before your honor in this honorable court, then and there to show cause if they can, why said suit and proceedings therein had, should not

stand and be revived against them and be in the same plight
44 and condition that the same were in at the time of the abatement thereof; and further to stand and abide such order and decree in the premises as to your honor shall seem meet.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY,
By L. C. BLACK, *Its Receiver*,
By DILLINGHAM, HUSE & HOWLAND,
Plaintiff's Solicitors.

DILLINGHAM, HUSE & HOWLAND,
Solicitors and Counsel for Plaintiff.

And afterwards, and on the same 10th day of June, A. D. 1899, a subpœna was issued on said bill of revivor, which said subpœna and the officer's return thereon is in the words and figures following:

The President of the United States of America to Sarah B. Harris and Charles A. Harris of Brattleboro, Vermont, and citizens of the State of Vermont, and Henry H. Hollister, a citizen of New York, in the State of New York:

You are hereby commanded that you and each of you personally appear before the judge of the circuit court of the United States for the district of Vermont, in the second circuit, at Burlington, in said district, on the 3d day of July, 1899, at ten o'clock a. m., to answer to a bill of revivor exhibited against you in the said court by The Great Western Mining and Manufacturing Company, a citizen of Kentucky, by L. C. Black, its receiver, and further to do and receive whatever said court shall have considered in that behalf; and this you are by no means to omit.

Witness, the Honorable Melville W. Fuller, Chief Justice
45 of the United States, at the city of Burlington, in said Vermont district, the 10th day of June, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

GEO. E. JOHNSON, *Clerk.*

DILLINGHAM, HUSE & HOWLAND,
Solicitors and Counsel for Orator.

Form No. 302.

I hereby certify, that on the 13th day of June, 1889, at the city of New York, in my district, I served the within subpœna to answer bill of survivor, upon the within named Henry H. Hollister, by exhibiting to H. B. Babcock, an adult in charge of Mr. Hollister's office the within original, and at the same time leaving with him a copy thereof.

WM. H. HENKLE,
United States Marshal, Southern District of New York.

Dated June 13, 1899.
(J. G.)

UNITED STATES OF AMERICA, } ss:
District of Vermont, }

At Brattleboro, in said district, on the 12th day of June, A. D. 1899, I served this subpœna on the within named Sarah B. Harris and Charles A. Harris by delivering to each a true copy and attested copy thereof with this my return thereon endorsed.

Attest: FRED A. FIELD.
U. S. Marshal,
By J. M. STODDARD, *Deputy.*

Fees.

Trav'd 77 miles	4 62
Services	4 00
	$8 62

(Endorsed:) Returned.—Served June 16, A. D. 1899.—Geo. E. Johnson, clerk.

46 And afterwards on the 26th day of June, A. D. 1899, defendant's motion to dismiss bill of revivor was filed in said cause, which said motion to dismiss is in the words and figures following:

United States Circuit Court, District of Vermont.

GREAT WESTERN MINING AND MANUFACTURING COMPANY }
vs.
SARAH B. HARRIS ET ALS. }

And now come the defendants in said cause and show cause why the petition of the plaintiff should not be granted, and say that said cause should not be revived, and move that said petition should be quashed and dismissed, for that,

1. Said cause does not survive against the defendants as executors or against the estate of said deceased, as appears by the original bill in said cause.

2. Said cause ought to be revived on account of the neglect of the plaintiffs to prosecute the same in the lifetime of said deceased.

3. Because said cause ought to have been prosecuted against said deceased in a court of equity, as the complainants had a complete remedy at law for the alleged wrongs and injuries, as set forth in said bill of complaint.

And for other reasons apparent on the papers and files in said cause.

SARAH B. HARRIS,
CHARLES A. HARRIS,
HENRY H. HOLLISTER,
By WATERMAN & MARTIN,
Att'ys for Def'ts.

47 And afterwards, and on the 25th day of August, A. D. 1899, said motion to dismiss said bill of revivor came on for hearing before the Hon. Hoyt H. Wheeler, judge, United States circuit court, sitting in equity.

And afterwards, and on the 11th day of September, A. D. 1899, the court handed down its decision on said motion to dismiss bill of revivor, which said decision is in the words and figures following:

United States Circuit Court, District of Vermont.

GREAT WESTERN MINING AND MANUFACTURING CO. v. B. D. HARRIS. } In Equity.

This suit is brought by the receiver of the corporation to recover back money paid to the defendant for capital stock issued upon supposed improvements of the property, without other consideration, and while the corporation is alleged to have been insolvent, and bought back to float mortgage bonds sold, and for assets lost by abstraction of the manager through alleged negligence of the defendant as director. The answer denies the insolvency and the negligence, and sets up the payment of all then existing debts. Proceedings for revivor have been brought against the executors of the defendant, which they have moved to have dismissed, because they say the suit does not survive. This motion has now been heard.

The assets of an insolvent corporation are trust property for payment of its debts, and may be followed for that purpose and
48 recovered back. The question now is not whether the plaintiff had a valid right to recover these assets of the defendant, but whether he has the same right to try to recover them of the estate in the hands of the executors that he had to recover them of the defendant.

By the laws of this State under which these executors are administering this estate, "actions of trespass, and on the case for damages done to real and personal estate," survive Vermont Statutes, sec. 2446. Generally everywhere, causes of action at law or in equity which relates to property are made to survive. This suit is in the nature of an action on the case for damages to property and would seem by this law of the State to survive. (Dana *vs.* Lull, 21 Vt., 393; Bellows *vs.* Allen, 22 Vt., 108.) The transaction complained of would lessen the property of the corporation, increase that of the defendant, and affect the assets of the estate in the hands of the executors. The survival turns upon the distinction whether property and assets are affected or a mere personal liability is created, as shown by Hall, *J.*, 22 Vt., 113.

Generally the statutes of the State where the suit is pending govern as to survival and the liability of assets in the hands of executors

and administrators, but this is not always so. In the Federal courts assets in the hands of executors or administrators may sometimes be reached in a different manner from what they can be in State courts. In Suydam *vs.* Broadna, 14 Pet., 67, Mr. Justice *Wayne* said: "It was certainly intended to give to suitors having a right to sue in the circuit court remedies co-extensive with these rights. These remedies would not be so if any proceedings under an act of a State legislature to which a plaintiff was not a party exempting a person of such State from suit, could be pleaded to abate a suit in the circuit court (Union Bank *vs.* Jolly, 18 How. 503; Green *vs.* Creighton, 23 How., 90; Brown *vs.* Ellis, 86 Fed., 357). The assets of this estate might, if the case could be made out, be followed by
49 independent suit in the hands of the executors; and it might as well be revived to reach them as brought.

Motion to dismiss revivor denied.

HOYT H. WHEELER.

William P. Dillingham, for plaintiff.
Eleazer L. Waterman, for defendant.

And afterwards, and at the October term A. D. 1899, said cause was continued until the February term A. D. 1900, of said court.

And afterwards, and on the 25th day of November, A. D. 1899, an order of revivor was filed in said cause, which said order is in the words and figures following:

United States Circuit Court, District of Vermont.

L. C. BLACK, Receiver, &c., Complainant,
vs.
SARAH B. HARRIS, HENRY H. HOLLISTER, Charles A. Harris, Executors.
} In Equity. No. —.

Order.

This cause came on to be heard upon the bill of revivor heretofore filed herein, and the motion of the defendants, executors of B. D. Harris, to dismiss the same, and was submitted to the court, on consideration whereof it is ordered, adjudged and decreed that said motion be, and the same is, hereby overruled, and that this suit and the proceedings which became abated by the death
50 of the said B. D. Harris be and the same are hereby ordered to stand revived and be in the same state and condition as the same were in at the time of the said B. D. Harris' death.

HOYT H. WHEELER, *Judge.*

And afterwards, and at the February term, A. D. 1900, said cause was continued to the May term, A. D. 1900, of said court.

And afterwards, and at said May term, A. D. 1900, said cause was further continued until the October term, A. D. 1900, of said court.

And afterwards, and on the 15th day of May, A. D. 1900, a deposition of Lucien S. Johnson was filed in said cause, which said deposition is in the words and figures following:

United States Circuit Court, District of Vermont.

BLACK, Receiver,
vs.
B. D. HARRIS, Executor. } In Equity.

Clark Burdick, Esq., of Newport, Rhode Island, is hereby appointed commissioner to take testimony in said cause in the State of Rhode Island.

Done this 16th day of April, 1900.

HOYT H. WHEELER, *Judge.*

51 STATE OF RHODE ISLAND, &c., }
County of Newport. }

GREAT WESTERN MINING AND MANUFACTURING CO.
vs.
B. D. HARRIS ET ALS.

At Newport in said county on the 18th day of April, A. D. 1900, then appeared Lucien S. Johnson, and after being carefully examined cautioned and sworn to testify the truth, the whole truth and nothing but the truth, gave the annexed deposition, which was taken down in shorthand by my clerk in his presence, and after being transcribed was by him signed. The deposition was taken at the request of L. C. Black, Esquire, to be used in the trial of the suit Great Western Mining and Manufacturing Co. *vs.* B. D. Harris *et als.*, pending in the United States circuit court, for the district of Vermont, and was taken by agreement of counsel under the enclosed appointment as a commissioner. Both parties were represented by counsel, the complainant by L. C. Black, Esq., and the respondents by E. L. Waterman, Esq.

I further testify that I am not interested in, nor counsel for, nor attorney of either party in said suit.

Fees.

Commissioner	$10 00
Stenographer	8 50
Witness and sheriff	3 60
	$22 10

52 And all of said fees have been paid by L. C. Black, Esq.

CLARK BURDICK,
Commissioner.

Lucien S. Johnson:

You are hereby required in the name of the State of Rhode Island and Providence Plantations to make your appearance before Clark Burdick, a commissioner to take testimony in Newport, in the county of Newport, over 201 Thames street, on the 17th day of April, A. D. 1900, at 12 o'clock in the forenoon, to give evidence of what you know relating to a proceeding Great Western Mining and Manufacturing Company, complainant ,plaintiff, and B. D. Harris, *et al.*, respondent-, defendant-.

Hereof fail not, as you will answer your default under penalty of the law, in that behalf made and provided. Dated at Newport, in said county, this 13th day of April, A. D. 1900.

[L. S.] CLARK BURDICK,
Commissioner.

JAMESTOWN, *April* 14, *A. D.* 1900.

I have this day summoned the within named witness as required by reading the said summons to him in his presence and hearing and paid him his lawful fees.

Services	50
7 miles travel	70
Pd. witness	$1 20
	$2 40

JAMES ANTHONY.

53 United States Circuit Court, District of Vermont. In Equity.

Deposition of Lucien S. Johnson, to be used in the trial of an action wherein The Great Western Mining and Manufacturing Company, H. L. Black, receiver, is complainant and B. D. Harris *et als.* are defendants, and taken by Clark Burdick, of the city and county of Newport, State of Rhode Island, commissioner, on the 20th day of April, 1900.

LUCIEN S. JOHNSON, a witness called on behalf of the plaintiff, having been duly sworn to testify to the truth, the whole truth, and nothing but the truth, testified as follows:

Direct-examination by Mr. L. C. BLACK:

Q. 1. Mr. Johnson, please state your place of residence and occupation.

A. I am a civil engineer; residence at Jamestown, Rhode Island.

Q. 2. Were you in the employ of the Great Western Mining and Manufacturing Company, and if so, when?

A. I was from 1884 till 1891, I think—as well as I remember.

Q. 3. In what capacity were you engaged with that company?

A. As mining engineer and local bookkeeper, and afterward as superintendent.

Q. 4. You might state what you mean by "local bookkeeper"?

A. Had charge of the accounts with the miners, wholly.

Q. 5. Where was the general office of the company?

A. At Ashland.

54 Q. 6. And Ashland some distance from Peach Orchard where the mines are located.

A. Fifty miles.

Q. 7. What was your first work done for the Great Western Mining and Manufacturing Company?

A. Surveying the mines.

Q. 8. What mines did you survey?

A. All of them.

Q. 9. If they were designated by name please designate them?

A. The first, the North and South mines, then the Old mines and then the Annie and Elizabeth mines.

Q. 10. State, if you can, what was being done with the Old mine—what is known as the "Old mine," in 1884?

Mr. Watterman, counsel for defense, objects to this question and to all questions of a like character, as irrelevant and immaterial upon the issues of the case.

Now, you may proceed, if you remember the question.

A. In 1884 or 1885 the Old mine was cleaned up and made ready to operate as a mine.

Q. 11. You say "cleaned up," what do you mean by that?

A. It was a mine that had been operated years before, probably before the war, and the entrance had totally filled up.

Q. 12. By the refuse coming down?

A. Exactly.

Q. 13. And the work consisted of cleaning out the entrance so as to make the mines clear so as to operate them?

A. Yes—passable.

Q. 14. Your attention is here called to the original mine map of the "Old mine," of which a tracing has been offered in evidence in this case and attached as Exhibit No. 102. I will ask you, what, if anything you had to do with this map?

55 A. I made it.

Q. 15. You made it?

A. Yes, sir.

Q. 16. Whose work was the surveys which are exhibited upon this map?

A. Mine.

Q. 17. Mr. Johnson can you indicate from this map what work was done on the "Old mine" in the cleaning to which you have referred?

A. All the fallen material was taken out of the mine entry.

Q. 18. To what extent, as shown on this map, had the mine entry been driven prior to the time of the cleaning up?

A. From one side of the hill clear through to the other.

Q. 19. What do these irregular black lines on either side of the mine plat indicate?

A. The "crop" line.

Q. 20. That is to say, the line of the coal deposit where it shows on the face of the hill?

A. Yes.

Q. 21. And the main entry, you say, had been driven through from one side of the crop to the other?

A. Yes.

Q. 22. Explain, please, what the various colors shown on this plat indicate?

A. The red was the old workings; the green was the first work that was done.

Q. 23. In what—work of what kind?

A. Entry driving or room work of any kind.

Q. 24. And for what year was that?

A. That was 1884, I think. The green we had worked down in 1884, and the brown in 1885.

Q. 25. And the pink?

A. That was done before the war in this case.

Q. 26. In the case of the "Old mine" the pink was done before the war?

A. Yes.

Q. 27. How long was the Old mine operated—that is to say,
56 how long did you continue taking coal from the Old mine?

A. Till the Annie and Elizabeth mines were well under way, and to some extent afterwards, up to, perhaps, 1889 or 1890, in a small way.

Q. 28. Do you know why they ceased operation upon the "Old mine"?

A. The entries ran into coal that was not worthy of working.

Q. 29. Not profitably?

A. No, sir.

Q. 30. For what reason were they not profitable?

A. The coal ran thin and the partings were heavy.

Q. 31. You said that the corporation of this mine was wholly abandoned, or some equivalent statement to that, or rather was worked till the Annie and Elizabeth was opened for work; can you give us the time that the Annie and Elizabeth was developed?

A. 1886 and 1887.

Q. 32. Do you know, when this Old mine was abandoned, in what

condition it was left in; were the pillars and stumps of coal removed?

A. I think they were generally removed.

Q. 33. What is the result of removing what are called the "stumps" and "pillars" in a mine?

A. The roof caves in.

Q. 34. Your attention is here called to the plat of the mine known as the "North and South mines," a copy of which plat has been put in evidence and is attached in this case as "Exhibit 103;" who made the plat here shown?

A. I did.

Q. 35. Whose work was the surveys shown?

A. My own.

Q. 36. There is on the lower margin, somewhat to the left hand corner, an opening or entry shown; what do they indicate?

A. The "mouth" on the Old mine.

Q. 37. Do you know when the North and South mines were opened for operations?

57 A. In 1883 and 1884.

Q. 38. The color scheme which you referred to in your testimony concerning the Old mine, is the same throughout?

A. Yes; I don't know as to the Annie and Elizabeth—I don't know so much about that, but it is true in these two.

Q. 39. Did you superintend the work of running the main entries in these two mines?

A. No, sir; only as engineer—I had no charge of the work.

Q. 40. But you did the engineering work?

A. I did the engineering work—yes.

Q. 41. When did you become, what might be known as "an active manager" of the mines, as superintendent of the mine work?

A. In 1886 or 1887, I don't remember which; I have no data here.

Q. 42. How long was the South mine operated?

A. That was operated till the Annie and Elizabeth mines were opened.

Q. 43. That was in 1886 and 1887?

A. 1886 and 1887.

Q. 44. Why did you cease operation in the South mine?

A. Because the bulk of the mine ran into coal that was not valuable.

Q. 45. That was what part of the mine shown on the plat?

A. All through the right-hand entry.

Q. 46. You mean the entry shown on the lower right hand corner on the plat running down to the margin of the plat?

A. Yes, known as the Lee-Small entry.

Q. 47. How long did you operate that part of the mine?

A. It was all abandoned together. That was afterwards connected to the Annie mine.

Q. 48. Which lay south of it?

A. Yes, in the same hill.

Q. 49. How long did you operate the North mine?

58 A. They were all abandoned about the same time.

Q. 50. Why was the North mine abandoned?

A. It all ran into poor coal. It was worked in a small way; into thin coal; the quality of coal was good.

Q. 51. Explain why a mine would become valueless on account of "thin coal"?

A. Because the expense of operating is greater than the amount of coal which can be received.

Q. 52. You must take out a large amount of refuse matter in proportion to the amount of coal which you get?

A. Yes.

Q. 53. Do you remember when you began the work of opening the Annie and Elizabeth mine?

A. Not positively; 1886 or 1887, I think.

Q. 54. I here direct your attention to the original map of the Annie and Elizabeth mine of which a partial tracing has been put into evidence and attached as an exhibit marked "Exhibit No. 104," and ask you who started the making of that map?

A. I made the lighter shaded portions.

Q. 55. I will ask you, Mr. Johnson, whether this scheme of coloring to the various years' working is the same on this as on the preceding maps concerning which you testified?

A. No, sir; it is not, because the years are not the same.

Q. 56. You have no way of absolutely fixing the period when you did begin to operate these mines?

A. No, not here; I haven't.

Q. 57. But your best recollection is—let me see if I can work backwards; no, I can't.

A. This red was the first work what was put on after I left.

Q. 58. The "deep red"?

A. Yes.

Q. 59. Can you indicate on this map, original map, the por-

59 tion of the working of the mine that was operated while you were connected with the concern?

A. Yes, all of the light——

Q. 60. The heavy tints have been done since your time?

A. Yes.

Q. 61. Is it possible for you to indicate what was done while you were connected with the company on or prior to January 1, 1899?

A. It would be if I knew the color scheme, but I don't.

Q. 62. Mr. Johnson, you are here shown a partial tracing, copy of the original plat of the Annie and Elizabeth mine, which tracing is intended to represent the portion of the work done on the Annie and Elizaheth prior to the first of January, 1889; I presume you have no knowledge of the correctness of the work as indicated by that plat?

A. Only by its appearance—none other.

Q. 63. Assuming that the tracing shown you comprises all of the work done prior to January 1, 1889, what would you have to say as to the time when the Annie and Elizabeth mine was opened.

Objected to as it is not shown that the witness knows anything in regard to the tracing.

A. I should say that it was 1887 or 1888 instead of 1886 and 1887.

Q. 64. Mr. Johnson, what is the process or operation of opening a mine—a coal pit?

A. Entries are driven for mining, either single or double, as the case may be; cross-entries are driven from them, either single or double, and rooms turned from the cross-entries; tipples are built, tracks laid, railroad tracks laid to the tipples, and machinery installed, if necessary and wanted, and all such kindred work as that; a mine must be ready to work before it can be worked.

Q. 65. And what was the pay given to the men who drove the main entries and the latteral or side entries?

60 A. That was usually paid—they received regular tonnage rate for what coal they worked.

Q. 66. They took out?

A. They took out, and in addition a stipulated price per yard, which varied according to the price of coal and times.

Q. 67. Give an idea of the prices paid in some of these cases?

A. It varied for $1.75 to $3.50, or even more, according to the difficulty of driving, per lineal yard.

Q. 68. From your knowledge of the Peach Orchard properties, where did you find the best coal, I mean the most valuable coal for profitable mining?

A. The North mine was probably the nicest piece—laid best.

Q. 69. And how did the Annie and Elizabeth compare with the North mine?

A. Very favorably.

Q. 70. Now, how many tipples did you build in connection with your mining operations there, and where were they located?

A. Including that reconstruction?

Q. 71. You may state the facts with reference to the building and rebuilding.

A. The North and South tipple was quite new; the Old Mine tipple was built new; the Annie and Elizabeth tipple was built partially new and partially reconstructed, from the North and South tipples.

Q. 72. The North and South tipples having been abandoned yon used such parts as were available for the Annie and Elizabeth tipples?

A. Yes.

Q. 73. When you abandoned the North and South mines did you draw the pillars and stumps of coal?

A. Partially.

Q. 74. You partially drew them in what parts of the mine, the front part of the main entrance or in the lateral?

A. As I remember it, in the North mine all we could get
61 were drawn. In the South mine—really I don't remember what was drawn in that, but not so much in that because we expected to get that from the Annie mine.

Q. 75. You expected to make use of the Lee-Small entry in the future?

A. Yes, sir; but I don't think any of the entry stumps were drawn in the South mine, but I am not positive.

Cross-examination by Mr. WATTERMAN, counsel for defendant:

X Q. 1. Do you recollect in regard to the price of coal at the time of the abandonment of the mines which you have mentioned?

A. No, sir.

X Q. 2. Do you remember that at the time it was very low?

A. I know it was low for a very long time all through there, but just when it was low I can't remember dates.

X Q. 3. Do you remember when price advanced?

A. No.

X Q. 4. Would not the question of whether it was profitable or not to work such mines depend largely upon the price of coal?

A. Certainly.

X Q. 5. Do you know how the price of coal has been since the time these mines were abandoned and up to the present time, in a general way, whether higher or lower than at that time?

A. Now it is very much higher, but I had nothing to do with the sales department and didn't give remarkably close attention to that.

X Q. 6. So that the price of the coal didn't enter into your judgment as to the profitableness of working the mines at that time?

A. Only as decided by my superior officers.

X Q. 7. It was a subject upon which you had no knowledge?

A. No authority.

62 Redirect-examination by Mr. BLACK, counsel for plaintiff:

R. D. Q. 1. Do you recollect, Mr. Johnson, the average thickness of the vein in the North mine, where it was considered profitable to mine as prices were at the time you were operating there?

A. Not close enough to say.

R. D. Q. 2. Not close enough to say?

A. No.

LUCIEN S. JOHNSON.

And afterwards, and at the October term, A. D. 1900, said cause was continued until the February term, A. D. 1901.

And afterwards, and at said February term, A. D. 1901, said cause was entered "with court."

And afterwards, and on the 23d day of May, A. D. 1901, the orator filed its testimony and exhibits in said cause, which said testimony is in the words and figures following:

United States Circuit Court, District of Vermont, the Second Circuit.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY, &c., Complainant,
vs.
B. D. HARRIS, Respondent.

Room 17 Temple Bar. Telephone, Main 2495.

CINCINNATI, OHIO, *April* 17, 1901.

63 In pursuance of the power given me by the commission hereto annexed, I, H. H. Grant, commissioner therein named, do hereby certify that, after being duly sworn, the testimony of Jordan Pugh, John Carlisle, L. C. Black, and Haven H. Keys, with the exhibits therein referred to, hereto annexed, was taken before me at the times and places therein stated, on the part of both the orator and defendant in the cause now pending in the circuit court of the United States of America for the district of Vermont, in the second circuit, wherein The Great Western Mining and Manufacturing Company is orator and B. D. Harris is defendant. That said witnesses were duly sworn, as therein stated, and the said testimony was reduced to writing by me and signed by said witnesses respectively, as therein appears. And that the said testimony was taken after the notice to counsel for the respective parties in said suit, and was begun and continued from time to time, as appears from said depositions, by stipulation of counsel, and the return thereof delayed by like stipulation.

And I further certify that at the taking of said testimony, C. B. Matthews, L. C. Black or Harlan Cleveland appeared on behalf of the Great Western Mining and Manufacturing Company, and Reuben Tyler on behalf of the defendant, B. D. Harris.

Witness my hand and seal this 17th day of April, A. D. 1901.

H. H. GRANT, [L. S.]
Commissioner, &c.

$170.00. CINCINNATI, OHIO, *April* 17, 1901.

Received of L. C. Black, receiver, one hundred and seventy dollars ($170.00) on account of fees as commissioner, expenses of binding and expressage of within report.

H. H. GRANT,
Commissioner.

64 The President of the United States of America to H. H. Grant, of Cincinnati, Ohio, Greeting:

Know ye, that we, in confidence of your prudence and fidelity, have appointed you a commissioner, and by these presents do give you full power and authority diligently to examine upon their respective corporal oaths, before you to be taken, witnesses produced before you in the States of Ohio and Kentucky, on the part of both the orator and defendant, in a certain cause now pending undetermined in the circuit court of the United States of America for the district of Vermont, in the second circuit, wherein The Great Western Mining and Manufacturing Company is orator and B. D. Harris is defendant, touching the premises.

And we do hereby require you, before whom such testimony may be taken, to reduce the same to writing, and to close it up under your hand and seal, directed to Geo. E. Johnson, clerk United States circuit court, district of Vermont, at Burlington, Vermont; and that you return the same when executed as above directed, annexed to this writ, with the title of the cause, endorsed on the envelope of the commission, into the said circuit court, before the judges thereof, with all convenient speed.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of Burlington, in said district of Vermont, this first day of March, A. D. 1897, and of the Independence of the United States the one hundred and twenty-first.

[L. S.] GEO. E. JOHNSON, *Clerk.*

65 MR. BLACK'S OFFICE, *Feb.* 1, 1898.

JORDAN A. PUGH, of lawful age, being by me first duly sworn, testifies and deposes as follows:

Direct examination by Mr. MATTHEWS:

Q. State your name, age, residence and occupation?

A. Jordan Pugh; residence, Baltimore, Maryland; I am an accountant in the employ of the Standard Oil Company.

Q. What is your age?

A. I am twenty-eight years of age.

Q. State whether or not you have been in possession of the books of the Great Western Mining and Manufacturing Company?

A. I have.

Q. Please state how long you have been a book-keeper and what your qualifications are of judging of accounts?

A. I had charge of a set of books of the Standard Oil Company for five years.

Q. Do you understand the theory of book-keeping?

A. I do.

Q. And were you able to judge of the state of the business of this

Great Western Mining and Manufacturing Company from their books so far as it was developed in those books?

A. Yes, sir.

Q. How far back do those books go?

A. You let me refer to my report.

Mr. MATTHEWS: Is there any objection to that?

Mr. TYLER: No, I am not going to object to that. When the time comes I am going to ask a few questions and demand an opportunity to recall him.

A. It has been some time since I examined the books. I want to make certain about the date. (The witness examines a paper.)

66 The period covered was as I have shown in this report, from March 1, 1883, to December 31, 1889.

Q. I wish you would state what character of accounts were kept in these books?

A. There were the ordinary person accounts of a mercantile house, expense accounts, and the construction account, into which were put all the expenditures of the company other than for current expenses; that is, all expenditures for additions to the plant, and so forth.

Q. Please state whether or not you found any accounts with stockholders?

A. For the purpose of the examination I made it wasn't necessary to examine into that question.

Q. Can you tell from memory whether there were accounts with stockholders, a stock account?

Mr. TYLER: I object, the books will show.

A. I am under the impression there were not.

Q. Did you find any original investment account?

A. Those items were all in the construction account, all the money that was put into the concern.

Q. What books did you have in your possession when you were making this examination?

A. The ledgers, the journals, and—I was going to say a sales book, but the sales were journalized, to the best of my recollection, as the sales were entered in the journal.

Q. State how the books that you had in your possession compared with the ordinary run of books that you would expect to be kept by an enterprise of this kind?

Mr. TYLER: I enter an objection.

A. They are such books as would identify the profit and loss of any concern.

Mr. BLACK: Just put over here the books you referred to, Mr. Pugh.

The WITNESS: I find here one book I would like to look

67 at for just a moment, to see whether it was embraced in my examination. It appears to be a sales-book, it is numbered

Journal No. 2. (The witness examines the book.) That book I mentioned is included, Journal No. 2.

Q. Now I find by your statement of the 1883 business——

Mr. TYLER: We have got a statement here covering those years Mr. Pugh examined, have you any objection to its going in with such statements as he may make?

Mr. TYLER: I suppose the purpose of your calling Mr. Pugh is because of his examination of the books as an expert, and then I wish to recall him after Mr. Carlisle has an opportunity to examine them.

Q. Mr. Pugh, look at this paper and say what it is (handing witness a paper)?

A. It is a report I made to Mr. Black after I had examined the books of this company.

Q. Is it in your handwriting?

A. Yes, sir.

Q. Covering what periods?

A. I state in the report, between March 1st, 1883, and December 31st, 1889.

Q. And how did you make that out?

A. I was asked to examine the books to determine whether the company had made any profits during the period mentioned. I found that all the expenditures of the company were embraced in their expense accounts and their construction account; that is, all expenditures that referred in any way to the profit of the company. I checked from the books the original entries into the ledger, all the entries, and I analyzed the construction account and saw what entries, if any, that were charged to that account could be classified as expense items; that is, the items which should have been deducted from the profits shown by the books of the company. You will find that construction account analyzed closely in that report.

68 Q. Could you tell what was originally charged to the construction account when the company went into business first, and took from this?

A. The books in my possession didn't show just what the charge to construction was for; that is, in the nature of property acquired and detail of buildings and miles of track and number of cars and so forth. If any such went in I simply took what was on the books here.

Q. Could you turn to the books now and show what was the original charge against the construction account?

A. Yes, sir.

Q. Please do so.

Mr. TYLER: You mean by that the original charge in 1883, from the time you took the book.

A. Yes, sir.

Q. You do not know what was before *or* that time?

A. No, sir.

A. (Examining book.) The first charge here is from the journal, and I shall look there. (The witness examines another book.)

Q. Give the number of the journal and page in connection with your answer.

A. The first charge to the construction account is entered from Journal No. 1, folio 156.

Q. Just read the journal entry.

A. It is for $29,073.26, and the detail given is, "For an amount of advance by Mr. John Carlisle prior to March 1, 1883, on account of improvements to the mining company's property, for which notes were given to him by the Great Western Mining and Manufacturing Company in settlement; one note dated March 1st, 1883, at three years, 6 per cent. interest, $26,194.42; one note dated March 1st, 1883, at three years, 6 per cent. interest, $2,878.84.

Q. Is the original purchase of the property shown at all in those books?

Mr. BLACK: Whether a capital account?

69 A. No, I think not.

Mr. BLACK: Has the ledger got an index there?

A. No, there is an index here (indicating).

Mr. TYLER: I glanced over the statement; I do not think there is anything in reference to it.

A. The additions to the value of the property were embraced in the construction account.

Q. Is there anything to show in the books what the original property was charged up at, capital or otherwise?

A. Nothing further than the entries in the construction account.

Q. Now I notice by this statement that you have an amount charged here of $13,788.94, which you say is arbitrarily charged to construction account; please explain what you mean by that?

Mr. TYLER: Better refer to where it appears in his statement.

Mr. MATTHEWS: On the first page.

A. The earnings of the company during that year.

Q. What year?

A. This is from March 1st to December 31st, 1883, it was part of a year, as shown by the account of their earnings, amounted to $53,102.48, and their expenses during that same period were $66,891.42. The exact difference between those amounts was charged to the construction account, and it is impossible from the records to tell how that amount was arrived at.

By Mr. BLACK:

Q. Have you an analysis in your statement of that $13,000?

A. Yes, sir.

Q. Where is that anaylysis on your paper?

A. It is under the same head, under the heading "Construction account."

70 Q. If you have paged that you might just give the page.

A. The analysis of the items embraced in that charge will be found on pages 10 and 11 of my report.

By Mr. MATHEWS:

Q. I see there is an amount, $1,682.57, contained on pages 10 and 11 of your report, which leaves unaccounted for of the construction amount mentioned between $11,000 and $12,000; is there anything on the books to show what that construction account included?

A. It doesn't leave it unaccounted for as an expenditure of the company, but it leaves it unaccounted for as to any detail as to what the charges consisted of. The amount you have mentioned, $1,682.57, is itemized in my report, showing what the company claims to have purchased for that given amount; that is, I could locate items bought to that value. The difference is the amount arbitrarily charged to construction—or rather it is embraced in that amount; and some part of the $1,682.57, might be passed to construction; though from the information at hand a part of it might be expense. It is impossible to say just how that should be divided.

Q. I was going to ask you whether or not there is anything from the books or vouchers that indicate whether any part of this $1,682.57, is repair account, or properly chargeable to construction account; can you tell what?

A. I could not tell.

Q. The other balance, that is, the difference between $1,682.57 and $13,788.94, so far as you have been able to judge from the books, is what?

A. It is the exact difference between the earnings and the expenditures of the company during that period.

Q. For or against the company?

71 A. It exactly balances the business of that period.

Q. Profit or loss?

A. Neither profit or loss as you will see by the summary.

Q. I do not mean as carried into the profit and loss account, but I mean as a difference unaccounted for between the earnings and expenses.

A. I do not exactly understand the purport of that question.

Q. You have stated that the earnings were $53,102.48.

A. Yes, sir.

Q. And that the expenses were $66,891.42.

A. Yes, sir.

Q. Now there is an apparent accounting on pages 10 and 11 of your report of $1,600 and odd dollars of that—$1,682.57 carried into the construction account; how is the balance accounted for, if in any way?

A. From the books in my hands, there was no way of telling how they reached the conclusion that that was a construction item—whether any items for it at all are on the books, I should have to look at the books again.

Q. Please look at the books and see whether there are any items as to how that money was expended.

A. (Examining book.) Yes, sir.

Q. How are they accounted for?

A. You will find below, where I analyzed that charge. On pages 10 and 11 there is a statement as follows: "Even assuming that the entire amount above, that is, the $1,682.57, is chargeable to construction account, it would leave the account charged with $12,106.37, for labor and freight on material received for construction purposes."

By Mr. BLACK:

Q. That is, assuming that it was all true construction?

72 A. That is, assuming that it was all true construction. I have stated here that a further explanation should be made before the charge is passed, and such explanation could be made only by the bookkeeper who wrote the entry or the man under whose authority the entry was made.

By Mr. MATTHEWS:

Q. Look at the paper now handed you, and marked Exhibit A of this deposition, and state what it contains, Mr. Pugh?

A. It contains the report of the earnings of the company and the moneys expended for either expense items or for construction items?

Q. Does it cover all expenditures of the company?

A. As far — the books in my possession disclosed, yes, sir.

Q. And from what sources did you get that?

A. From the books I have mentioned.

Q. What books; just identify them and have them marked.

A. The ledger of the Great Western Mining and Manufacturing Company, commencing with page 1 of the construction account.

Mr. TYLER: How do you designate it in your report?

A. Ledger A. I called it Ledger A in my report although it was not a lettered ledger.

Marked by the commissioner in the book as Ledger A, as referred to in the testimony of Jordan Pugh.

A. Also Ledger B.

Marked by the commissioner as Ledger B, as referred to in the testimony of the witness.

A. Also Journals No. 1, No. 2 and No. 3.

They were marked by the commissioner.

73 Mr. MATTHEWS: Now I offer this report of Mr. Pugh's, let it be marked as Exhibit A. (It is so marked.)

Q. This shows, Mr. Pugh, so far as you are able to judge from the books that were put in your possession, a correct statement of the books and the totals as the books show?

A. Yes, sir.

By Mr. BLACK:

Q. You have a construction account for each of those years in detail in this report?

A. Yes, sir.

Q. What class of items did you put in that construction account as you found them upon the books?

A. Such items as represented, as far as I could determine, additions to the plant—that is, other than repairs.

Q. Now in taking out those items how or by what rule did you undertake to determine that an item was a proper item for the construction account?

A. I assumed that purchases such as live stock, cars, tracks, timber for building purposes, where they stated it was for building purposes, and items of that nature, were construction items.

Q. Now in cases where there was an expenditure, for instance for timber, were you able to tell from the books as to whether that timber was used in repair or in original construction?

A. They purchased a great deal of timber. As I recollect they called — "Caps and posts," and I think my report states that those items were charged by the company to construction; but from the fact that they were constantly requiring them I was lead to believe they were expense items, and I classed those as expense items. Where their books showed that the items were buildings I classed those as construction.

74 Q. Now on page 10 you have items such as these, "T rails;" did the books disclose with that item anything determining that was original construction, or simply repair?

A. No, sir.

Q. The items of harness, nails, turn-outs, spikes, was there anything on the books in connection with those items which would disclose whether or not those materials were used in ordinary repairs or whether they were used for original or additional construction?

A. No, sir.

Q. The same is true of such items as castings, floorings, timber, brick, chains, oakum, grates, belting and so forth?

A. I could not determine.

Q. But notwithstanding that, you did place them in construction account?

A. I have stated there in analysis of that particular item, that $13,000 odd dollars, that those were the only items that could be

charged to construction. They were tangible things. The rest of the charge must necessarily be made up of labor and freight.

Q. But with reference to the items constituting the $1,682.57, were the items sufficiently definite upon the books to enable you to say beyond doubt those were true construction items?

A. No, sir.

Q. Now is that analysis you have referred to, was that system of making up the other construction accounts maintained by you in this examination?

A. Yes, sir.

Cross-examination by Mr. TYLER:

Mr. TYLER: Reuben Tyler, attorney, appears in behalf of defendant in place of his regular counsel and reserves the right to demand a recall of the witness for cross-examination after defendant and his counsel shall have had an opportunity to carefully examine
75 Exhibit A or a copy thereof. Without waiving this right, he puts the following questions on cross-examination:

Q. You stated, Mr. Pugh, that you had been an accountant for the Standard Oil Company for five years?

A. Yes, sir. I said I had had charge of a set of books there for five years.

Q. What other experience have you had as a bookkeeper or an accountant in actual business?

A. I had been an assistant bookkeeper at the Standard Oil Company previous to that time for, as near as I can recollect, five years; that is, assistant bookkeeper and learning accounts there in the office. I had preparation and then five years' charge of the books?

Q. Where and in what establishment?

A. In the general offices of the Standard Oil Company here in this city, in Cincinnati.

Q. Then in Mr. McDonald's office?

A. Yes, sir. In Mr. McDonald's office.

Q. Where are you now living and how employed?

A. I am an accountant in the office of the Standard Oil Company in Baltimore, Maryland.

Q. How long have you been there?

A. I have been there shortly over one year.

Q. Have you had any experience in the business of coal mining?

A. No, sir.

Q. Or coal handling?

A. No, sir.

Q. Do you know what "caps" and "posts" mean or what they are used for?

A. No, sir.

Q. You spoke of instances in which you could not tell whether certain items should be charged for expenses or to construction ac-

count, and have stated that in some instances certain amounts must have been for labor and freight, as I understood you?

A. Yes, sir.

Q. Might not those charges for labor and freight have
76 been properly chargeable to construction account if used for construction of new betterments?

A. Yes, sir.

Q. When and where did you make your examination of these books?

A. Here in Cincinnati, in the spring of the year 1896.

Q. At whose request?

A. At the request of Mr. Black.

Q. Who paid you for your services?

A. Mr. Black.

Q. When was this report made, this Exhibit A?

A. Directly after it was finished.

Q. Then it was in the spring of 1896?

A. In the spring of 1896.

Mr. TYLER: In behalf of the defendant I reserve the right to recall the witness for further cross-examination after examination of Exhibit A.

(Signed) JORDAN A. PUGH.

MR. BLACK'S OFFICE, *February* 5, 1898.

And also JOHN CARLISLE, who being duly sworn, deposeth and saith as follows:

Direct-examination by Mr. BLACK:

Q. Please state your name?

A. John Carlisle.

Q. Please state what connection you had with the Great Western Mining and Manufacturing Company from 1882 to 1888?

A. I was the secretary and treasurer.

Q. Please state what business the Great Western Mining and Manufacturing Company was engaged in?

A. It was engaged in the mining and selling of coal.

Q. Where were the mines located?

77 A. At Peach Orchard, Lawrence county, Kentucky.

Q. In 1883, what property did they there own in the way of real estate or mines?

A. Well, they owned about 6,000 acres and the mines; some mines were opened and had been worked.

Q. You say they owned some 6,000 acres?

A. Yes, sir; I ought to have said of the 6,000 acres about 4,000 were in fee and about 2,000 mineral rights.

Q. That is, by mineral rights you mean you were entitled to entered on the 2,000 and mine the coal out of it?

A. Mine the coal or ore or anything in the way of minerals.

Q. Without royalty?

A. Without royalty.

Q. Have you any photograph, drawing, plan or plat of this property at Peach Orchard?

A. I think I have, but I do not know just where I could lay my hands on it now.

Q. Please bring for inspection anything in that line you have?

A. I will.

Q. Was the Great Western Mining and Manufacturing Company an incorporated company?

A. Yes sir.

Q. With how much capital stock outstanding?

A. Well, at what time?

Q. I mean in 1–83.

A. $200,000, I think, fully paid up.

Q. As secretary and treasurer of that company, what books and documents did you have control of, or charge of, from 1883 to 1889?

A. I had charge of the records, the record book, and the stock certificate book.

Q. Did you keep, as treasurer, any accounts with the Great Western Mining and Manufacturing Company during that period?

78 A. On my individual books I kept an account of all moneys received by me for the mining company and all moneys paid out for them.

Q. Where was the general office of the company maintained?

A. At Ashland, Kentucky.

Q. What books were kept there?

A. Why, all the general account books connected with the business.

Q. From 1883 to 1889 who had charge of the Ashland office?

A. Mr. G. S. Richardson.

Q. You were asked to produce here certain books by a subpœna, what answer or return can you make to the subpœna?

A. I am ready to produce those books whenever you wish to examine me on them.

Q. Have you all the books and documents mentioned in the subpœna?

A. I think I have all the books, except probably the record book, and that I will try to find—that is the minute book, you know.

Q. Please bring the books and documents mentioned in the subpœna at our next session in our examination.

Adjourned.

MR. BLACK'S OFFICE, *March* 1, 1898.

Continuation of the examination of the above witness by Mr. CLEVELAND:

Q. Have you the books, Mr. Carlisle, which you were asked at the last hearing to produce?

A. Will you please state what books they were?

Mr. BLACK: The minute book, the stock register, and books of account, containing treasurer's account.

79 A. I have the minute book, I brought that over. (The witness hands a book to Mr. Black.)

Q. Have you the stock register?

A. I never had any.

Q. What kind of a book did you have with reference to transfers of stock?

A. I don't know we ever had any book about the transferring of stock.

Q. Did you have any kind of a record showing the number of the certificate issued, the number of shares, to whom issued, residence of the party to whom issued, the date, to whom transferred, and the number of the original certificate, and so on?

A. There was a sheet kept of that kind, so as to show who held the stock.

Q. Do you know where that is?

A. I do not.

Q. The original?

A. I do not.

Q. When was the last you saw of it?

A. In 1892.

Q. Where?

A. I can't say whether that was here or at Ashland or where it was.

Q. Did you keep that yourself or was it kept at Ashland?

A. I think I kept it all.

Q. Do you remember in 1894 of having seen those sheets showing the original issue and transfer of stock such as you have described, in the office of Jones & James when you gave a deposition?

A. I have no recollection of it.

Q. You remember, do you not, of giving a deposition in the case of Woodward, assignee, against The Great Western Mining and Manufacturing Company and others, in that year?

A. I remember of giving a deposition, I do not know what year it was; I presume it was that year.

Q. It was the only deposition you ever gave in that case, was it?

A. Yes, sir.

80 Q. That was case No. 1799, United States circuit court for the district of Kentucky, entitled Samuel Woodward, assignee, *vs.* The Great Western Mining and Manufacturing Com-

pany *et al.*, and was the suit in which Mr. Black was appointed receiver; is that correct?

A. Well, I can't answer anything about the correctness of it. Mr. Black was appointed receiver in 1892, and you say this deposition was taken in that case in 1894?

Q. Yes, sir.

A. Then how could it have been in the case, Mr. Black being receiver?

Q. Taken later, you know.

A. I couldn't state positively about those things, but that is my impression.

Q. Have you the books of account of yourself, which show any accounts between you and the Great Western Mining and Manufacturing Company?

A. My own books have an account with the Great Western Mining and Manufacturing, but the company's books I think show all the transactions.

Q. Will you explain, Mr. Carlisle, from 1882 down the method in which the business of the Great Western Mining and Manufacturing Company was conducted and the records kept of its business?

A. The business was conducted as other mining businesses are generally conducted. We had a bookkeeper, who kept the books at either Ashland or Peach Orchard; we had a superintendent, who looked after the mining of the coal, and a sales agent. For most of the time the superintendent and sales agent were the same party. We had a board of directors, with the regular officers.

Q. Where was the market for the Peach Orchard coal?

A. The market for the Peach Orchard coal was at different places over the country; the bulk of it was sold in Cincinnati.

Q. Where is Peach Orchard situated?

81 A. In Lawrence county, Kentucky.

Q. How far is it from Ashland, Kentucky?

A. About fifty miles.

Q. How was the coal brought from Peach Orchard to Cincinnati between 1882 and 1889?

A. It was brought by rail to Ashland and loaded in barges there, and brought to Cincinnati by water. However, after the completion of the—it was not called then, but is now called the Chesapeake and Ohio railway, much of the coal was shipped by rail; I do not remember what year that was completed.

Mr. TYLER: You mean clear through to Cincinnati?

A. Clear through to Cincinnati. The coal that went to other places in the State of Kentucky went by rail in car lots over the different portions of the State.

Q. Through Ashland?

A. Some of it; some of it stopped at Louisa, and some at Catlettsburg; and some of the coal was sent to Chicago—some went over, I think, *to* Scioto Valley road, and some over the C. H. and D. and

some over the Big Four, and went to Chicago and western points; I think we sold some coal that went out as far as Dakota.

Q. Through whom were the collections made for the sale of the coal?

A. The coal that was sold to the C. H. and D. Railroad Company, the bills were collected by me, and some of the barges of coal that were sold at wholesale at Cincinnati; all other collections were made by the superintendent or the sales agent at Ashland.

Q. Through whom were the disbursements of the expenses of maintenance of operation, or construction, made?

A. They were made at the company's office at Ashland and Peach Orchard.

Q. Were any disbursements made by you?

A. The only disbursements, I think, that were made by me
82 were the payment of bills for the purchase of supplies for the mines and the store, when they were made here in Cincinnati, and some freight charges and minor bills.

Q. When coal was shipped to you at Cincinnati for you to dispose of in the way you have indicated, how was that matter treated on the books of the company at Ashland?

A. They had an account there called the Cincinnati coal yard, and all the coal that was shipped to Cincinnati was charged to that account. When I disposed of the coal I would notify them of the barges that were sold, and the cars that were sold, and gave them the statement of the amount that it sold for.

Q. How about disbursements that you made, did they appear on the books of the company?

A. All of them.

Q. In what way would they get there?

A. The bills were sent to the company and were approved by them, and then were sent down to me to settle.

Q. And when you settled, what then?

A. Then I think that the books will show that I was either credited with the amount that was settled or that the Cincinnati coal yard was credited; I do not remember just how that was now; it has been so long since I have seen the company's book that I can't answer those questions exactly without an examination of the books. If I had those for some time to look over I think I could answer those questions more satisfactorily and more promptly.

Q. Under what name does the account in your own books to which you have already referred, that you had with the Great Western Mining and Manufacturing Company, appear?

A. Well, I had three or four different accounts in my books; one was the Great Western Mining and Manufacturing Company, the other was the treasurer's account, and another was coal account, and then I had an account with the Cincinnati, Hamilton and
83 Dayton railroad, and probably with some others who had purchased coal.

Q. Regularly?

A. Regularly.

Q. Now what was this Great Western Mining and Manufacturing account, what did it show?

A. Well, that showed what I had paid out for the Great Western Mining and Manufacturing Company, what I had become responsible for, charged to them, and the credit side showed what I had received.

Q. What did this coal account show?

A. The coal account showed what coal I had purchased outside of the coal received from the Great Western Mining Company.

Q. That is, purchased to fill contracts?

A. Purchased to fill contracts.

Q. Then what did your treasurer's account show?

A. The treasurer's account would show what I had paid out for dividends and for interest on bonds mainly.

Q. You did not include everything that came into your hands as treasurer, then?

A. No.

Q. Simply special things?

A. Special things.

Q. And then these separate accounts with purchasers of coal, like the Cincinnati, Hamilton and Dayton Railroad Company, showed what?

A. Showed the amount of coal that was charged to the railroad company during the month and the amounts received from them.

Q. Would the books of the Great Western Mining and Manufacturing Company, as kept at Ashland, together with our books, give a complete financial history of the company from 1882 on?

A. Well, I think—is it not from 1883, Mr. Cleveland?

Q. I think it was 1882—when the reorganization took place.

A. December 1883.

84 Q. Probably say from the first of January, 1883, on.

A. The books of the company will show completely all the transactions without any connection with my books. My books don't show completely, but the books of the company show the whole transaction.

Q. As I understand you a good many entries for the Great Western Mining and Manufacturing Company's books especially with reference to the sale of coal by you in Cincinnati and receipts by you were furnished at stated intervals by you from your private accounts or private books in which these accounts to which you have already referred were kept?

A. The items were furnished to the company, that is, to the bookkeeper of the company, whenever any transaction occurred, they were not simply the items that were taken from my books, and furnished at stated intervals. At the end of each month I gave them a statement of the amounts of the money received by me from collections I had made for sales of coal and the amount I had paid

out, but all other transactions were furnished whenever they occurred.

Q. You made up this statement from your books did you not, from your accounts with them in your books?

A. Partially so, but mainly from the accounts furnished me by the Cincinnati, Hamilton and Dayton Railroad Company.

Q. The Cincinnati, Hamilton and Dayton Railroad Company was only one?

A. Yes.

Q. But a very large purchaser of coal of the Great Western Mining and Manufacturing Company?

A. They were the largest.

Q. So that to get the original entries as to the transactions of the Great Western Mining and Manufacturing Company it is necessary partly to take your books, in connection with theirs, although they show the same results?

85 A. I don't think so. As I stated before, the company was furnished with all the information so as to make the original entries on the company's books; I didn't wish them to be completed with my books at all. The coal was sold to the C. H. and D. Railroad Company—and I speak of them because they were the largest purchasers—the bulk of it in the barges, brought down the river elevated at one of the coal elevators here and loaded on to the C. H. & D. cars. The price received was for the coal delivered to the C. H. & D. Railroad Company on their tracks. The books of the company, as I stated before, showed that each barge as it was shipped down was charged to the Cincinnati coal yard, and each carload was shipped to the Cincinnati coal yard. Now, none of those items appear on my books, or but very few, if any, of them; they were kept on the company's books. At the settlement made at the Hamilton and Dayton at the end of each month, or soon after I had to get from the Cincinnati, Hamilton and Dayton Railroad Company the amount paid out by them for freight and for elevating and for switching which was deducted from the amount, and the balance paid over to me and that I always furnished a copy of to the bookkeeper of the Great Western Mining and Manufacturing Company, and it would appear on their books, I presume.

Q. Well, however it may be, the books speak for themselves, and the accounts will show for themselves just how they are.

A. The company's books, yes, sir.

Q. And your books between you and the company, will show for themselves?

A. Not exactly, no.

Q. I mean they will show when corrected?

A. They can't be very well corrected now, it is too late to remember a great many things.

Q. Well, then, when explained?

A. Well, I do not know how you are going to explain from my books.

86 Q. Mr. Carlisle, do you know the defendants in this case?
A. Yes, sir.
Q. Do you know B. D. Harris?
A. I do.
Q. Where does he live?
A. At Battleboro, Vermont.
Q. How long have you known him?
A. About sixteen years.
Q. Was he at any time connected with the Great Western Mining and Manufacturing Company?
A. He was.
Q. When did that connection begin?
A. I think in December, 1885.
Q. How did it come about, if you know, that B. D. Harris became connected with the Great Western Mining and Manufacturing Company?
A. The original company was composed of R. B. Bowler, Larz Anderson, George K. Schoenberger, George Carlisle and others. After my father's death (the death of George Carlisle) his interest passed to his two sons; after Mr. Bowler's death his interest was represented by his sons; after the railroad was constructed to Peach Orchard it was found impossible to secure the assent of Mr. Anderson, Mr. Schoenberger and the Bowler heirs to furnish the capital necessary to put the mines in operation except to a limited degree. I had furnished myself the bulk of the cost of putting the mines in condition to operate, and I had been compelled to become responsible to the gentlemen named before for the moneys that they put up. The majority of the stockholders in 1883 were willing to sell out their stock, and I then induced B. D. Harris and his brother to purchase the stock owned by Larz Anderson, George K. Schoenberger and the Bowler heirs.
Q. How much stock had been issued at that time, in 1883?
A. I think about $200,000.
Q. How was it held after the Harrisses had purchased the interest referred to?
87 A. The records of the company, the minute book, will show that.
Q. Can't you remember?
A. I couldn't state exactly.
Q. Was there any change in the holding of the capital stock after the Harrisses came in in 1883 up to the time that there was an increase of capital stock by a stock dividend?
A. I don't think there was.
Q. That is, was there any changing among the holders of the stock?
A. No, sir; I do not remember that there was.
Q. What mines were in operation in 1883 when the Harrises came into the company?
A. What we called the old mine.

Q. Was that the only one?

A. I think there was only one at that time.

Q. How long had it been open?

A. Oh, about thirty years.

Q. Were there any other improvements on the property at that time?

A. There was a number of miners' houses.

Q. The store?

A. Only a frame store; an old stable had been turned into a store.

A. A tipple?

A. A tipple, of course.

Q. How was the coal mined; how was it situated in the mountain, and what operation had to be gone through with to get it out?

A. The veins of coal in that section of country are horizontal, and the mining is what is termed drift mining. They go into the side of the hill and drive what is called a main entry, which is generally about six to eight feet in width.

Q. Right through the coal?

A. Right through the coal, and several hundred yards in depth. The roof of the entry has to be propped up with timbers to prevent any falling or accident, and after the entry has been driven in several hundred yards there are rooms turned off. First
88 there are lateral entries driven, and from those lateral entries are what we term rooms, and the mining is done in those rooms. There are pillars of coal left standing, so as to prevent the mine collapsing. This old mine had had but very little coal taken out of it at the time that we started in; the main entry was driven.

Q. That is, you mean in 1883?

A. In 1883, but there were very few lateral entries and rooms.

Q. How thick was the seam?

A. The seam, including partings, was between five and six feet.

Q. What did opening a mine then consist of—simply driving these entries in the side of the hill and propping up?

A. And the lateral entries and the rooms, what they called turning rooms. Now, it generally takes in opening a new mine nearly a year's time before you can begin to get any returns from it; that is the length of time to get them in operation, to get them profitable.

Q. What is done with the coal that is taken out of the entries?

A. The coal is sold for a very small price, because it is badly broken up, mostly fine coal; you can't get much lump coal out of entry driving, very little; the lump coal comes out of the rooms.

Q. How is the coal brought from these rooms?

A. There are tramways laid in those entries for the small cars, carrying about a ton apiece, and they are brought out by mules; you may have three or four cars in a train; brought out to the opening of the mine and dumped over the tipple on to the screens which separates the fine coal from the nut coal and from the lump coal, making about three classes of coal. In addition to this old mine,

which was the only opening we had when the new organization was effected in 1883, we after that opened a mine directly opposite.

Q. What do you mean by that, Mr. Carlisle?

89 A. The opposite side of the ravine, on the east side; the other was on the west.

Q. The same vein?

A. The same vein.

By Mr. BLACK:

Q. Suppose you explain the topography where your railroad ran, your tipple and the mines, briefly.

A. The country up there is very much broken, it is a part of the Appalachian range, although the mountains are nothing but hills, but very high, seven or eight hundred feet high and bisected with valleys; and the railroad ran up to the boundary line where it crossed into this property through a large tunnel and down a creek called Miller's branch. The old mine that I spoke of was situated on the west side of Miller's branch, and was probably thirty or forty feet above the main railroad track, so as to give us room for a tipple and screens.

Q. That is the outcrop was some thirty or forty feet above the level of the valley?

A. Above the valley, yes. Now on the same horizon or level, on the east side of Miller's branch, we opened the vein; and then we opened another vein on a branch running into Miller's branch on both sides of it, making two more mines, that made four altogether. And then, subsequently, further down the creek, where it joined with what is called Nat's creek, a short distance up Nat's creek, we opened two other mines, one on each side of the creek, one called the Elizabeth and the other the Anna mine.

By Mr. CLEVELAND:

Q. Do you remember in what year they were opened?

A. I couldn't state exactly in what year they were opened, but I think they were started in 1884, 1886, I think they were in different years up to 1889.

90 Q. How did B. D. Harris and G. D. Harris acquire this ownership in this stock?

A. By purchase.

Q. Do you know what they gave for it, and from whom?

A. I stated before whom they bought it from; I couldn't state how much they bought except from the records; the amount they paid for it was, I think, $30 a share, but I am not positive.

Q. Was the stock fully paid for?

A. Yes, sir.

Q. And its par value was $100, was it?

A. Yes, sir.

Q. You have spoken of a railroad here; the Great Western

Mining and Manufacturing Company had nothing to do with that railroad, had it?

A. Not in the construction of it.

Q. That is what I mean, in the construction; they used it of course?

A. Yes; they made a contribution towards the construction of it, to induce it to be built.

Q. You have spoken also of the store, what was that; what do you mean by the store?

A. It was a country store, where the miners and others could purchase their supplies.

Q. And that is what that account means, the store account refers to the store owned and run by the company?

A. Exactly.

Q. Do you know what the indebtedness of the Great Western Mining and Manufacturing Company was on November the 15th, 1883, when this transfer took place?

A. The books will show that.

Q. Where would it show, Mr. Carlisle? Will you examine the books that are now in the possession of Mr. Black, the receiver, and which has already been referred to in evidence herein, and from them make me a statement as to the indebtedness of the Great Western Mining and Manufacturing Company of the 15th of
91 November, 1883, and of what it consisted; and in doing that give both the gross amount of indebtedness and the items which can properly be deducted from it as showing the net indebtedness; the same information for the 31st of December, 1884; the same for the 31st of December, 1885; the same for the 31st of December, 1886; the same for the 31st of December, 1887, and the same for the 31st of December, 1888? Now, Mr. Carlisle, I show you a paper which seems to be in your handwriting and to have been prepared in 1889, showing the stock of the company, and the indebtedness in 1883, and the stockholders and the amount of stock held by each, and then the indebtedness of the Great Western Mining and Manufacturing Company, and of what it consisted, and what could be gross and what could be properly set against it for each of the periods and dates I have mentioned; it may be of assistance to you. I ask you, in the first place, if you recognize that paper; if you remember anything about it (hands paper to witness)?

A. Yes, that is my handwriting, I recognize my handwriting; but I do not remember anything about getting up this paper.

Q. Do you remember the occasion of it?

A. I do not.

Q. I show you what purports to be a typewritten copy of the paper already referred to, and ask you if you recognize that?

A. Yes; I recognize the typewritten copy.

Q. What do you remember about that, Mr. Carlisle, you say you recognize it?

A. I do not remember anything about it now, but I could look the matter up and see.

Q. Will you take that copy and verify it, and see if the statements there as to the indebtedness of the company are correct according to the books; and also reflect your recollection as to the occasion of your making this statement and having this copy made, and when it was done and for what purpose?

A. I will try to do it.

Adjourned.

92 Office of John Carlisle.

MONDAY, 10:30 A. M., *March* 7, 1898.

Continuation of the examination of Mr. JOHN CARLISLE by Mr. CLEVELAND:

Q. Mr. Carlisle, have you had an opportunity to examine the books of the Great Western Mining and Manufacturing Company so as to be able to state as to the assets and liabilities of that company during the period mentioned, and state whether or not the paper that was shown you was substantially correct?

A. I have had the books of the mining company to examine, but unfortunately not all of the books; the cash books are missing and the indexes to the ledgers.

By Mr. BLACK:

Q. Just mention what cash books you refer to?

A. I mean the cash books for the years 1883, '4, '5, '6, '7 and '8. My impression is that that paper that was shown to me is substantially correct, so far as I can tell without a close examination of the books.

By Mr. CLEVELAND:

Q. Do you remember who got that paper up?

A. I think I did.

Q. It is in your handwriting—the original—is it not, which I now show you? (Hands witness a paper.)

A. The paper that you now show me is in my handwriting, and I think was the original paper from which the statements referred to were copied.

Q. That is, by the statements you refer to you mean the typewritten copy of it that you had?

A. Yes sir.

93 Q. Is this the typewritten copy to which you refer? (Hands witness paper.)

A. This is the typewritten copy, but it is not an exact copy, there are some little changes which are not material.

Q. Will you mark the original "Exhibit 1" and the copy "Exhibit 2?"

A. Yes, sir.

The papers were offered in evidence by Mr. Cleveland, and handed to the commissioner, who marked them Exhibits 1 and 2, respectively.

Q. Referring to this original statement, marked "Exhibit 1," Mr. Carlisle, when did you prepare that, and what was the occasion of the preparation, if you know? .

A. I do not know.

Q. Cannot you state approximately when it was?

A. I should not like to do that.

Q. Could you by reference to the paper itself, and to the date to which it was carried down?

A. I cannot state positively, but I think it was done for the benefit of the directors and stockholders of the company; whether it was done annually or all at one time I have no recollection now.

Q. Do you remember of any occasion when such a statement as that, showing the condition of the company each year from 1883, down to the close of the year 1888, would have been required, or a matter of interest to the stockholders or directors of the company?

A. Annually a statement was made similar to this, for the benefit of the company at their annual meetings.

Q. Apparently the paper, Exhibit 1, was prepared at one and the same time; was it not carried forward all fastened together, from page to page?

A. Possibly; but from the fact of there being two different kinds of paper used, it looks as if it might have been done at two different times.

94 Q. What do you refer to; two different kinds of paper?

A. I mean the first four pages are on paper of a little different color and a little different size than that of the latter paper of Exhibit No. 1.

Q. Now referring to Exhibit No. 2, which you say is substantially a copy of Exhibit 1, a typewritten copy, do you remember the occasion of having copies of that Exhibit 1 made?

A. I think that that was prepared for my own satisfaction, probably in order to determine how much money we would need to pay off the indebtedness and to continue the work.

Q. Do you remember whether there was more than one of these typewritten copies made of that Exhibit 1?

A. Yes, sir; I should think three or four were made.

Q. What was done with the others?

A. I think I kept them.

Q. Have you any of them now?

A. I have one yet.

Q. Did you keep all the others?

A. I think I sent one of them to Mr. Harris after this suit was begun, but whether he had one previous to that or not I cannot tell.

Q. How long did you have them in your possession? When were the copies made?

A. That I cannot answer.
Q. Well, you have had them some years in your possession?
A. They must have been some years in my possession from the fact of your finding that up at Ashland five years ago.
Q. The company failed in 1892, did not it?
A. The company went into the hands of a receiver in 1892.
Q. That is what I mean, you had these papers at that time that you still have?
A. I certainly must have.
95 Q. Mr. Carlisle, do you remember that in 1889, prior to the bond issue, that you got up this statement shown as Exhibit 1, and also had these typewritten copies made for the information of the directors and stockholders of the company?

Objection by Mr. Typer.

A. As I stated before I do not remember just when it was done, but possibly it might have been at that time.
Q. Have you any recollection about it at all?
A. No, I have no recollection.
Q. Do you have any recollection of having furnished the defendant Harris in this case with one of those typewritten copies of Exhibit 1, like Exhibit 2, at that time, or about the time of the bond issue, the early part of 1889?
A. I have no recollection of that, but possibly I did.
Q. Was Mr. Harris at Ashland and at Peach Orchard during the time that the negotiations were on for the issue of bonds?
A. Oh, yes, frequently.
Q. That is, between the early part of 1889 and May, 1889?
A. We had determined to issue and sell $300,000 of bonds I think about 1887, and negotiations were had with different parties, and finally in 1889 we secured the assistance of Messrs. Elliott, Johnson & Company, the brokers, to sell the bonds.
Q. You met Elliott, Johnson & Company in 1889, did you?
A. I think I did; yes, sir.
Q. Between the time you took the matter up with Elliott, Johnson & Company and the issue of the bonds was Mr. Harris out there?
A. Yes, sir.
Q. Was he acquainted with the condition of the company?
A. I think he was.
Q. Did you inform him of the past history of the company as to its indebtedness and liabilities?
96 A. I think he was fully informed in regard to all that.
Q. You of course knew it?
A. Yes, sir.
Q. Did the other stockholders and directors know it?
A. They all knew it.
Q. You concealed nothing from them as to the status of affairs?
A. No, sir.

Q. Does this paper, Exhibit No. 1, and its copy, Exhibit No. 2, show the financial condition of the company for each of the years from the time the Harrises came into the company up to 1889?

A. I think so.

Q. How much money had been expended in that company, Mr. Carlisle?

A. When?

Q. In 1883, when the Harrises came in?

A. The paper that you have shown me will show that, I think.

Q. Do you remember it apart from the paper?

A. There had been fully $250,000 or $260,000 spent up to that time.

Q. How was that represented?

A. In the original purchase of the property and the improvements made upon the property.

Q. And as I understood you the other day, $200,000 had been paid in stock; is that right?

A. Possibly I can answer that question better by telling you what was done. The original company, The Great Western Mining and Manufacturing Company, purchased this property, I think, in 1856, paying, I think something over, about $100,000 for it; then all the improvements that were made the stockholders were called upon to furnish the money for them and they were given stock for it; so that the amount of $200,000 of stock represented full cash value paid for it.

Q. You say $250,000 had gone into it, how had the other $50,000 been put in it?

97 A. Why, from moneys borrowed and some of the earnings.

Q. So that in 1883 the debts of the company were about $50,000?

A. Well, they were a little more than that.

Q. Do you remember any more accurately than that?

A. The papers will show that and the books will show that.

Q. Where did you get the information that is contained in this paper, Exhibit 1?

A. I obtained it from the books of the company.

Q. I notice in this paper, Exhibit No. 1, it states the indebtedness of the Great Western Mining and Manufacturing Company on November 15, 1883, was, notes to John Carlisle, $29,073.26; notes to John Carlisle, $7,000; were there such notes as that due from the company to you at that time?

A. Yes, sir.

Q. How did the company come to be indebted to you at that time in that amount, Mr. Carlisle?

A. For moneys furnished by me to make improvements on the property.

Q. And you held the evidence, the notes themselves, did you?

A. Yes, sir.

Q. I also notice on that same paper notes to Schoenberger, Bowler

& Anderson, $20,699.94; were there such notes, and, if so, by whom were they held and what was the consideration for them?

A. Yes, sir, there were such notes; they were held by the parties named therein, and were given for moneys loaned by them to the company to make these improvements.

Q. Had the company been operating prior to 1883?

A. Yes.

Q. During what period of time?

A. I can't say what period of time prior to 1883, but, in
98 fact, prior to the breaking out of the civil war there had been considerable business done by bringing coal down by barges from the mines down the Big Sandy river; and after the breaking out of the civil war, of course, there was an interregnum there for quite a period; later on the company started the mines, after the railroad to the mines was completed.

Q. When was that?

Mr. BLACK: If you will turn to the old minute book it will probably help to fix the dates.

The witness examines the book.

A. Early in 1883.

Q. Had the company prior to 1883 lost any money in operation?

A. Well, they hadn't made any money.

Q. Well, you speak of this $36,000 and odd dollars notes to you, and $20,000 notes to Schoenberger and others being for construction, I wanted to ask simply whether or not any of it represented losses?

A. Oh, no, because the business did not amount to anything.

Q. Now, referring to this same paper, Exhibit No. 1, on page 2, I see there is an item, personal accounts due at Ashland, $7,755.07, what does that mean, personal accounts due at Ashland?

A. It meant for supplies and work done at Ashland by the company; for instance, we built a tripple there at the Ohio river for the purpose of loading coal into the barges from the cars.

Q. There were various accounts of various sorts?

A. Yes, sir.

Q. That were due at Ashland, where the office of the company was?

A. That is right, payable there.

Q. I notice a freight account, due Chatteroy Railroad Company for $4,874.50, what was that item, Mr. Carlisle?

A. That was for freight on hauling coal and various other matters, supplies and things for the mine.

99 Q. Now, I notice from the total that is made by those various items of indebtedness, namely, $69,402.77, there is deducted two items, as follows: personal accounts due company, $12,781.16; cash on hand, $2,776.08, or a total of $15,557.24; just explain what those items mean?

A. The personal accounts due the company were mainly for coal

sold to different parties, and the cash on hand of course was the cash they had.

Q. And that left the net indebtedness $53,845.53?

A. That is right.

Q. Is that right?

A. That is about right; yes, sir.

Q. Coming back, Mr. Carlisle, to these improvements, that you say this money was borrowed to construct, had all those improvements been put on the property at the time originally in 1856, before the war, or afterwards?

A. All after the railroad was started to be constructed.

Q. Do you remember when you started to construct the railroad?

A. About 1881.

Q. Before that the company had only owned the land?

A. Before that the company owned not only the land but they owned a number of houses, many of which had gone to destruction, but they owned a very good house on the river bank and a store, and they had a mine opened, three tunnels built through the property, and that was the old mine I spoke of the other day as having been started first.

Q. That was prior even to the building of the railroad?

A. That was prior to building the railroad; yes, sir.

Q. But they had not operated that mine much?

A. They had not operated that part of the mine we worked in; they had operated previous to the breaking out of the civil war the mine between the river and this old mine; that is on that same line.

100 By Mr. BLACK:

Q. Have you any map which shows the outline of this property?

A. Yes, sir; I will hunt it up.

By Mr. CLEVELAND:

Q. What improvements, then, were made after these original improvements, that you have spoken of, and prior to the completion of the road?

A. Well, they were the building of some forty or fifty dwelling-houses; they were built mainly on Miller's branch, some on Burgess' trace branch, and putting up of the boarding-house, and the opening of two other mines, I think, the North and South mines, and the laying of tracks in them, and a number of things; the tipple house, of course, would always go with the opening of mines.

Q. And the tipple house for the new mines?

A. Yes, sir.

By Mr. BLACK:

Q. Did you use the same tipple house all the way through?

A. No; we tried to use a tipple house for two mines, but we had to build another tipple house for the third mine.

By Mr. CLEVELAND:

Q. Then you continued to use the same store and these other improvements that had been there, did you, or did you build a new store at that time?

A. No, we built another store; the old store was located three miles from where we were operating the mines, on the bank of the river.

Q. What were these dwelling-houses you refer to?

A. The miners' houses.

Q And the boarding-house was a boarding house for the miners?

A. Yes, sir.

101 Q. Will you mark on the map which you will hunt up for us, in some way so I can designate it clearly, the places where the different improvements that you have already referred to were at the time of the opening of the railroad?

A. You mean the old improvements?

Q. The old, and those that you made before the opening of the railroad in anticipation of the opening of the railroad, the dwelling houses, and so on?

A. I think I can do it, not exactly, of course, but approximately.

Q. How long had this indebtedness of $36,073.26 been owing to you on the 15th day of November, 1883?

A. I can't tell that; the books will show that.

Q. Cannot you state approximately?

A. Well, I should state possibly for two years prior to March the 1st, 1883.

Q. How about the indebtedness to Schoenberger, Bowler & Anderson for $20,000; how long had that existed prior to November, 1883?

A. Only a few months, I think.

Q. Now, turning, Mr. Carlisle, to the next date, on December 31, 1884, found on page 3 of Exhibit No. 1, I notice the indebtedness is put down as, notes to John Carlisle, $36,073.26; to Schoenberger, Bowler and Anderson, $20,699.94; is that the same as existed the previous year?

A. Yes, sir; that is about the same.

Q. They are the same notes?

A. The same notes.

Q. Now, I notice the statement is made here, and increased during the year by notes to G. B. Whitcomb, for mining machines, $3,918; notes to John Meese, for barges, $650; notes to Oliver Brothers & Phillips, $670.78; notes to Warren, Burchard & Company, $125; notes to Norwalk iron works, $750, and notes to Post & Company, $1,121.39, a total of $72,035.17; what were those notes given to those parties for, and are they correctly stated?

102 A. They are correctly stated, so far as I can recollect. The notes to Whitcomb & Company were for machines for mining by compressed air; the notes to John Meese & Sons were for flats, not barges; that to Oliver Brothers & Phillips was for mine cars. I cannot state what the notes to Warren, Burchard & Co. was for. I do not remember what they sold us. The notes to the Norwalk iron work swas on account of an air compressor, and the one to Post & Co., I think, was mainly for rails for the mines.

Q. Now I notice there is also a statement of $15,000 of indebtedness, being the note of the company to the Cheshire Savings Institute, of Keene, New Hampshire, endorsed by the directors and secured by fifteen mortgage bonds of the company dated July 1, 1884; was that indebtedness actually existing at that time?

A. It was.

Q. What was that money borrowed by the company for, and from whom?

A. The company issued in 1884, $60,000 of bonds upon the property, in order to raise money sufficient for the improvements that were made, and other matters, and instead of selling the bonds outright to them, the Cheshire Savings Institute of Keene, New Hampshire, took the company's note and held these bonds as collateral security. We treated it as though the bonds had been sold outright for $15,000.

Q. You got the $15,000?

A. We got the $15,000.

Q. And it represented an indebtedness of the company to that amount?

A. It did.

Q. Who were the directors that endorsed that note?

A. My brother and myself and B. D. Harris and Mr. G. D. Harris.

Q. Then I notice, advanced by John Carlisle during 1884, $9,854.29; did you advance that amount that year?

A. I did.

103 Q. That is, out of your own personal means?

A. Out of my own personal means.

Q. And it was due you?

A. From the company.

Q. On an open account, I suppose?

A. That is right.

Q. Then, personal accounts due by company $23,703.06; is that right?

A. That is correct.

Q. What were those accounts, do you know?

A. A great many accounts were for supplies purchased by the company; mainly so, I think.

Q. What became of the other $45,000 of the first mortgage bonds, Mr. Carlisle; you say $60,000 were issued that year, 1884; $15,000 seems to have been placed with the bank at Keene, New Hampshire, as collateral; what became of the other $45,000?

A. There were $22,000 of them sold at one time, and there were $5,000 that were given to secure a note of $5,000, which is the same as the sale of the bonds, and then there was $8,000 turned over to me later on account of the indebtedness due me, and then there were $10,000 sold at another time.

By Mr. BLACK:

Q. $8,000 was left with you as collateral?

A. No, not as collateral, it was turned over to me as payment.

By Mr. CLEVELAND:

Q. Coming back to this statement, Exhibit 1, I notice personal accounts due the company, $12,796.93, and cash on hand, $410.83; those personal accounts were as before?

A. As before, for coal sold.

Q. Leaving the net indebtedness December 31, 1884, $99,357.96?

A. That is right.

Q. What does this statement mean, the amount of net earnings for 1884 was $2,669.34?

104 A. That was the net earnings for that year on the amount of coal sold less the cost of it.

Q. How were net earnings made up?

A. By the deduction of expenses connected with such a business.

Q. What kind of expenses?

A. Mining, salaries and general expenses connected with such business.

Q. With operation.

A. Operation; yes.

Q. Not expenses of construction?

A. No.

Q. Then I noticed that the company received that year, from note of July 1, 1884, $15,000—what is that note referred to?

A. That is the note that was given to the Cheshire Savings Institution.

Q. And that it received from sale of twenty-two bonds, $22,000?

A. Yes, sir.

Q. They were sold that year?

A. They were sold that year.

Q. And the company received the money?

A. And the company received the money.

Q. Did you sell the bonds?

A. No, I think they were sold through Mr. Harris.

Q. Then I notice: Received from John Carlisle, advances, $9,854.29; that is what you already referred to?

A. Yes, sir.

Q. That makes a total of receipts from net earnings and money borrowed, or advances, and bonds sold, of $49,533.63; now, what was done with that money, Mr. Carlisle?

A. If you will read further along, Mr. Cleveland, you will see what was done with it.

Q. What was it?

A. Paid out in construction, opening mines, building houses, tracks, &c., $45,254.10, leaving a balance of $4,269.53, to be expended for construction the following year.

105 Q. Now, then, there was outstanding on December 31, 1884, Mr. Carlisle, in addition to the $112,565.72 of indebtedness as shown in the statement for that date, the $22,000 of bonds?

A. Yes.

Q. Which had been sold during the year?

A. The other part, Mr. Cleveland, represented mainly the floating debt, you know.

Q. What do you mean by floating debt?

A. I mean what could be called a live debt, payable on accounts current and notes and things of that kind, as distinguished from a permanent debt in the shape of a bonded debt.

Q. Now, coming to the next year, Mr. Carlisle, page 5 of this Exhibit No. 1, for the year ending December 31, 1885, I notice that the indebtedness was, notes to John Carlisle, $29,073.26, and interest, $4,651.71, are those notes the same notes as appeared previously?

A. Yes, sir.

Q. And the $4,651.71 is what?

A. It is the interest for thirty-two months at six per cent. on the above notes.

Q. Then I notice, notes to John Carlisle $7,000, is that the same?

A. That is the same $7,000 note.

Q. Then I notice notes to B. S. & A. $20,099.94, what is that?

A. Those notes must be the original notes given to Schoenberger, Bowler and Anderson.

Q. I notice from Exhibit 2, the typewritten copy of this Exhibit 1, that item does not appear—$20,699.99, notes to B. S. & A.—do you know how that comes?

A. I do not but I will look it up.

Q. Will you examine into that Mr. Carlisle, and find out whether or not those notes were paid during that year, and if so, how?

A. I will look it up.

Q. Referring again to Exhibit 1, I notice note to Cheshire Savings Institute, $15,000?

106 A. That is the same one.

Q. The same one as was secured by the bonds is it?

A. Yes, sir.

Q. Note to O. C. Phelps $5,000?

A. That was secured by five bonds.

Q. Is that money borrowed?

A. That money was borrowed.

Q. Note to Boyd for barges, $7,117.72 what is that?

A. That was for barges purchased from Boyd & Company for the use of the company in shipping coal to Cincinnati and other places.

Q. To Whitcomb, $2,242.50?

A. That was the balance of the notes due him for the mining machines.

Q. And Richardson, for store, $2,152.80, and Rockwell, for store, $2,498.34; what are those amounts?

A. Previous to 1885 the store was run by outside parties; by Mr. Richardson, Mr. Rockwell and, I think, Mr. Noartrup, but the company decided to run the store themselves and bought out these men, simply paying them the cost of the goods on hand, as I understand it.

Q. These were purchase money notes?

A. These were purchase money notes.

Q. Then, sundry parties $615.32?

A. That was for small notes given to parties for purchases.

Q. Making a total of $96,552.69, according to Exhibit 1?

A. Yes.

Q. I notice that there is below that advanced by J. C. in 1884, $9,854.29, and advances by J. C. in 1885, $34,732.14; what does that mean?

A. The $9,854.29 is the amount I had advanced the year previous, and which was a debt owing to me for that year; $34,732.14 was what I advanced in 1885, which was also a debt due to
107 me, which made a total due to me on my personal account of $44,586.43.

Q. Did you actually advance that money?

A. I did.

Q. For what purpose?

A. I prefer to answer that when I look up the Bowler, Schoenberger & Anderson matter.

Q. Now I notice, 1885. personal accounts more than due company, $872.43; what does that mean?

A. It is "less" instead of "more." It means instead of putting down the total item of personal accounts due company and personal account owed by the company, we simply deducted those that were due the company from those the company owed, and that is the difference between them.

Q. In other words, the company owed $872.43 more than was owed them?

A. That is right.

Q. Then going to page 6 of Exhibit 1, I notice there is brought forward a balance of 1884 of $4,269.53; that means a balance of what?

A. The balance to be applied to construction in 1885 left over from 1884.

Q. Then you received net earnings in 1885, $4,503.19; is that right?

A. Yes.

Q. And then, note to Phelps, $5,000; what is that?

A. That, as I stated before, was for money gotten from him, and five bonds given him as security.

Q. Then you had ten bonds sold?

A. Yes, sir.

Q. Did *you* sell those?

A. I do not know whether *I* did or not.

Q. Then, advances from John Carlisle, $34,732.14?

A. That is the item I have already referred to.

Q. That makes a total of $58,504.86?

A. Yes, sir.

Q. Just tell how that was applied?

A. $21,598.14 was applied to construction—houses, improvements, stores, &c.—and $11,598.09 for the construction of barges;
108 $4,000, dividends on stock; interest paid on bonds and note, $3,490; notes paid and interest, $8,745.89; then interest paid to Schoenberger, Bowler & Anderson, $1,122.29.

Q. What was the last item you gave before interest to Schoenberger?

A. According to this paper, Exhibit 2, it was notes paid and interest, $8,745.89.

Q. What is it according to Exhibit 1?

A. $4,651.71.

Q. Will you look up that matter, Mr. Carlisle, and see what was the actual amount paid to you that year, either in the form of interest or on note; explain the difference between the two papers?

A. Yes, sir.

Q. In the indebtedness which you have figured for 1885, gross and net, is there included the $22,000 of bonds, and the $10,000 of bonds, sold prior to 1885 or during 1885?

A. No, sir.

Q. The indebtedness referred to represents as before the floating indebtedness, as I understand?

A. That's right.

Adjourned.

Office of Mr. John Carlisle.

WEDNESDAY, 10 A. M., *March* 9, 1898.

Continuation of the examination of Mr. JOHN CARLISLE *by* Mr. CLEVELAND:

Q. Referring, Mr. Carlisle, to the examination of the last sitting, I call your attention to the statement in Exhibit 1 of notes to B. S. & A., $20,899.94, which does not appear in Exhibit 2, and which you promised to look up; in connection with the further item of, advances by J. C. in 1885, $34,732.14; have you looked that matter up, and can you now state what was the fact in reference to those items?

A. That in Exhibit 2 is covered by advances made by John
109 Carlisle in 1885 of $34,732.14. That is, I took up those notes and paid them off myself and charged them to the company.

Q. It is, therefore, a mistake in Exhibit 1 to have in the list of indebtedness both the notes and the advances under date of December 31, 1885?

A. Yes sir.

Q. In connection with that statement as to 1885, there also appears on Exhibit 1, interest paid on notes to J. C., $4,651.71; on Exhibit 2 there is an item, notes paid and interest, $8,745.89; how does that difference come about if you know?

A. The item of $4,651.71 interest appears on No. 2 as well as on No. 1, and the item below in the summary which says, notes paid and interest, $8,745.89, includes the $4,651.71 and notes to various individuals paid off during that year, which were not included in No. 1, because No. 1 was simply a memorandum from which No. 2 was made.

Q. Coming now, Mr. Carlisle, to the statement as to the condition on the 31st day of December, 1886, it states the indebtedness was, first, notes to John Carlisle, $33,724.97, and also $7,000, are they the same as already testified to in the previous year?

A. They are.

Q. Then the Cheshire Savings Institute $15,000 and the Phelps $5,000?

A. They are the same notes as testified to in the previous year.

Q. And the Whitcomb note, $2,358?

A. Those are the same notes charged in the previous years except one of the notes—there were a number of notes given to Mr. Whitcomb—one of the notes was paid off, reducing it to that amount.

Q. And the note to Mr. Richardson, $1,998.34, what is that?

A. My answer is the same as given in regard to the Whitcomb notes.

Q. And Boyd $3,064.68?

A. Those are the same notes that were referred to in the
110 statement for 1885, less the amount of notes paid off.

Q. Then what are those other amounts there, advances J. C. 1884, 1885 and 1886?

A. They are the same amounts as shown in the statements for 1884 and 1885, and the amount advanced in 1886, making a total of $40,991.86.

Q. Then none of these notes or advances had been paid in 1886?

A. None of these advances, no.

Q. I notice also a statement, less difference in accounts due to — in cash, $6,247.37; what does that mean?

A. That means that there was that much more due the company on personal accounts, and cash, than the company owed on personal account.

Q. That left the net indebtedness then on December 31, 1886 at what?

A. $110,982.48.

Q. Then turning over to the summary of 1885, as shown by Exhibit 1, the balance from 1886 is put down, $12,044.63; was that the correct amount?

A. No, sir, the correct amount was $7,950.45.

Q. Then the net earnings for 1886?

A. $6,021,81.

Q. You advanced during that year how much?

A. $4,504.63.

Q. Making a total of?

A. $18,476.89.

Q. How was that used during that year?

A. It was used for paying for construction, $5,889.35, in paying for ice breaks—the ice breaks were cribs built in the Ohio river to prevent the ice crushing against the barges and injuring them—that item was $1,298.75, and for barges $17.53,15, then interest paid on bonds and notes $3,490, and various notes paid off amounting to $3,632.20, making a total of $16,063.45.

Q. Leaving a balance?

A. Leaving a balance of $2,413.44.

Q. I notice in Exhibit 1 the statement, under the head of
111 application of these funds it says, decreased bills payable by $7,713.76 or 96 cents; is it the correct amount by which bills payable were decreased as given in Exhibit 1 or Exhibit 2?

A. Exhibit 2.

Q. Now turning to the year ending December 31st, 1887, what was the indebtedness, Mr. Carlisle, to you in that year?

A. The indebtedness to me on notes was the same as the year previous plus the interest on $33,724.97, which interest amounted to $3,046.99, making a total of $36,771.96, for which notes were given me and the old notes taken up.

Q. These notes were renewed each year, were they, and the interest added in?

A. No, the original note was not, I think, renewed until two or three years after, and then after that they were renewed. When it amounted to this $36,771.96 there were three notes given to me, two of $12,000 each and one of $12,771.96.

Q. Was the note for $7,000 which had been running for several years still held by you?

A. Yes, sir.

Q. And the Cheshire Savings Institute, $15,000 and Phelps $5,000 secured by the bonds of the $60,000 issue still outstanding?

A. Yes, sir.

Q. How much was due Mr. Whitcomb that year?

A. $2,742.60.

Q. That had increased had it?

A. Yes, by purchasing another machine, I think.

Q. And Richardson?

A. Richardson was reduced that year to $1,575.30.

Q. Boyd seems to have disappeared?
A. Boyd's notes were paid off.
Q. And Meese, how was that?
A. Meese was for flats purchased $650.
Q. How about the advances which had been made by you in 1884, '5 and '6 Mr. Carlisle, what was done with those that year?
A. There was paid on those $11,543.29.
112 Q. Leaving how much?
A. Leaving a balance due to me of $37,547.77.
Q. Then how did the net personal accounts stand that year, due over those unpaid?
A. The company owed $1,602.61 personal accounts more than was due to the company from personal account.
Q. And how much was the net amount of indebtedness?
A. $107,890.24.
Q. Was that floating indebtedness or did it include any of the bonds that had been sold?
A. It was floating indebtedness except the two notes to the Cheshire Savings Institution and O. C. Phelps which were secured by bonds.
Q. Now in the balance sheet for that year what balance was brought over from 1886?
A. $2,413.44.
Q. And what were the net earnings Mr. Carlisle?
A. The net earnings for that year were $21,579.67.
Q. And what other items?
A. Bills payable increased $600.11; personal accounts increased $1,644.65.
Q. What does that mean, bills payable increased $666.11, and personal accounts?
A. That was the net increase of bills payable, which were given for the mining machine and for flats.
Q. Why are they added in the personal accounts and the increase of bills payable over the year before?
A. To show where the money went; those items show the moneys that were received by the company, and such credits as would be applicable to cash.
Q. What would you call this summary; it is a summary of what kind?
A. It is a summary simply showing the net receipts for the year and the net payments for the year.
113 Q. Then how would you put bills payable in here, and personal accounts in here?
A. Increased.
Q. In that statement; that is what I don't understand?
A. For this reason: We increased that year the cost of barges $3,200, of which there was $650 of notes given, and there was also a reduction in that year of notes given paid, which would make the net increase of bills payable, $600.11. The actual amounts of notes

given were for the mining machines and for the flats; I can't state just what it was. How the personal accounts increased by reason of purchases made and indebtedness incurred in making certain improvements and other things, which were not paid off but was owing.

Q. How is that applicable that year?

A. That was applied to construction, $13.410.67; construction of barges, $1,300; interest paid on bonds and notes, $3,400, and paid to John Carlisle, on account of his advances, $11,543.96.

Q. Referring still to Exhibits 1 and 2, for the year ending December 31, 1888, what was the state at that time of the indebtedness of the company to you and others?

A. The notes to me were the same as in 1887, also the notes to the Cheshire Savings Institution and to Phelps were the same, and there was no change in the notes given to George Whitcomb, but the note to Mr. Richardson had been reduced to $775.30.

Q. How about the advances made by you?

A. The advances made by me were reduced that year by the payment of $12,479.55, making the net amount due me on advances $25,069.22.

Q. What was the net indebtedness that year?

A. After deducting the personal accounts and cash due the company, $777.05, the net indebtedness for 1888 was $91,585.03.

Q. Notes that were payable were how much?

A. $67,289.86.

114 Q. Does the summary show as to the application of the credits?

A. The net earnings were $30,610.95, and it was applied to construction, $2,217.04, interest on bonds and notes $3,490, interest on notes to John Carlisle in 1886, $3,046.99, dividends $3,500, paid John Carlisle in 1888, $12,479.55, paid personal accounts off $2,399.66, paid note $1,450, and then amount overpaid in 1887 of $506.75 brings the total up to $30,089.99, leaving a balance of $520.96.

Q. If figures that are shown by Exhibit 1 differ a few dollars or cents from that, which are the correct figures those shown by Exhibit 1 or Exhibit 2?

A. Those shown by Exhibit 2, I think are the correct figures.

Q. You spoke something of having recalled since our last meeting that this Exhibit No. 1 was a mere preliminary memorandum, what do — remember about that now?

A. I think that that memorandum was made here in my office from reports that I had from the bookkeeper received at different years, and afterwards taken by me to Ashland and compared with the books, and from which I had those typewritten copies made shown in Exhibit 2.

Q. Do you remember yet when it was you took it to Ashland or the occasion of it?

A. I can't state positively about that, Mr. Cleveland.

Q. What is your best recollection about it, Mr. Carlisle?

A. I think possibly it might have been done in the winter of 1889.

Q. Mr. Carlisle, have you the ledger and journal of the Great Western Mining and Manufacturing Company before you covering the period beginning in March, 1883, and already referred to in the evidence as Ledger A of Exhibit A of the testimony of Jordan Pugh and Journal No. 1 of Exhibit A of Jordan Pugh's testimony?

115 A. Yes, sir; the books mentioned are before you, having been in Mr. Black's custody since 1892.

Q. For the purpose of convenience will you mark the ledger referred to, Mr. Commissioner, as Exhibit 3, and the journal as Exhibit 4.

The commissioner so marks them.

Q. I wish, Mr. Carlisle, you would take the journal, Exhibit 4, and turn to folio 156, and the ledger, Exhibit 3, and turn to folio 1; what account do you find on page 1 of that ledger?

A. Construction.

Q. What is the first item of that account?

A. Bills payable $29,073.26.

Q. What is the corresponding journal entry?

A. Construction to bills payable, for amount of advances made by Mr. John Carlisle prior to March the 1st, 1883, on account of the improvements of the mining company property for which notes were given to him by the Great Western Mining and Manufacturing Company in settlement; one note dated March the 1st, 1883, at three years, 6 per cent. interest, $26,194.42; one note dated March the 1st, 1883, at three years, 6 per cent. interest, $2,878.84, making a total of $29,073.26.

Q. What is the next item in construction account?

A. On the ledger $7,000, on the journal, construction to bills payable for amount of improvements made, prior to May 1, 1883, for which note was given to Mr. John Carlisle and discounted through Union national bank, Cincinnati, $7,000.

Q. Were those notes actually given, and are those the notes which have already been referred to in your testimony, in Exhibits 1 and 2?

A. Yes, sir.

Q. Did all this money, $36,073.26, go into the improvement of the property as construction?

A. That and more.

116 Q. None of it was for operation, or interest, or fixed charges, or taxes, it was all actual construction and improvements of the property, was it?

A. That is right.

Q. Building of houses that you have already referred to, and store and other things and tipple?

A. Yes, sir.

Q. Now come to the next item what is it?

Q. In the ledger it is $13,788.94.

Q. What is it in the journal?

A. Sundries to sundries, for amount of expense, freight and other accounts, previous to January 1, 1884, this day closed and the balance charged to construction account as follows: earnings was charged first with $53,102.48, and construction was charged with $13,778.94; expense account was credited with $43,286,67, freight was credited with $21,239.20, discount was credited with $223.81, rent of barges $2,141.74.

Q. What were the earnings, $53,102.48, what does that mean?

A. That means all of these accounts that I have mentioned to which those items were credited were charged to earnings to balance those accounts.

Q. That is, to the amount of $53,102.48?

A. Yes, sir.

Q. The earnings were the gross earnings, were they, from the operation of the mines?

A. No, these were the amounts charged against it.

Q. I mean the amount of earnings that year were the gross earnings?

A. Yes, sir.

Q. The accounts, expense, freight, discount, rent of barges were closed by these entries and the aggregate charged either to earnings or construction?

A. Yes, sir.

Q. What were these expenses, freight, discount, and rent of barges—what kind of expenses were they?

A. The expense included the amount paid for mining coal,
117 the driving of entries and improvements in the mines, and the opening of mines—everything had been charged to expense account, and at the end of the year the amount charged to earnings was made to balance the amount of gross earnings for that year. The amount charged to construction was the difference between what the expenses had been and the earnings had been; but properly there should have been charged to construction a very much larger amount than the $13,788.94.

Q. As a matter of fact, Mr. Carlisle, the entry of $13,788,94 to construction is purely arbitrary, is it not?

A. No, sir.

Q. Is it not the exact difference between the expenses $66,891.42, for the year 1883, and the net earnings for that same year, as shown by Ledger No. 3, page 21?

A. It is just the difference between the expenses and the earnings; that is to say, that the expenses, including everything, was that much greater than the earnings.

Q. In other words, the expenses, as shown by these four items, for the year 1883, was $66,891.42; that is right, is it?

A. Yes, sir.

Q. The earnings, as shown in the ledger and journal accounts for the year 1883, was $53,157.66, less $54.98?

A. Yes, sir.

Q. Leaving earnings for the year 1883, $53,102.48; that is right, isn't it?

A. Yes, sir.

Q. And then the rest of that account is charged to construction?

A. It was all taken out of the expense account, not out of freight, discount or rent of barges.

Q. Neither freight, discount or rent of barges could be properly charged to the construction account?

A. No, except this, in the rent of barges it was somewhat
118 on the car trust fund plan, that is part of the rent was applied in the purchase of the barges.

Q. Is there any way to figure that?

A. No; not accurately; it is only a small item anyway.

Q. Those items that you refer to, freight, discount and barge rent, amount to $23,604.75?

A. That is right.

Q. That leaves to expense account, $43,286.67 for that year, does it not?

A. Yes, sir.

Q. How much of that $43,286.67 was current expense for operation maintenance as distinguishing from expense for construction account, if you know.

A. That could only be determined by an examination of the expense account, but I think a very large proportion of it could be.

Q. Would T rails be construction or expense?

A. Always construction.

Q. What were they used for?

A. For the mine cars, bringing them out of the mines and on to the tipple.

Q. Would harness be construction?

A. Yes, sir.

Q. How would that be construction?

A. To buy a harness for the mules to haul the cars out.

Q. That you view as you would steam engine?

A. Yes, sir.

Q. Then nails, I suppose?

A. Yes, sir.

Q. Turn-outs?

A. Yes, sir.

Q. What are turn-outs?

Q. The same as switches on a railroad?

Q. And letter files, is that construction?

A. That would be construction properly, because it was the fitting of the office.

Q. Spikes?

A. That was part of the track.

119 Q. And wagon and mules?
A. Yes, sir.
Q. Flooring?
A. Yes, sir.
Q. What was that used for?
A. I think possibly that was used in the tipple house.
Q. And timber?
A. Timber to prop up the mines.
Q. That is construction?
A. Yes, sir.
Q. And casting for the cars?
A. Various kinds; yes.
Q. And the construction of course of the tipple, or anything connected with that?
A. Yes, sir.
Q. How about leather, what did you use leather for?
A. I expect that the leather was used for washers connected with the machinery, &c.
Q. And brick, and chains, oakum, grates, belting, hardware, pulleys, wheels, rope, pipe, bank rail, they are also properly construction account?
A. Yes, sir.
Q. Now the labor of digging out this coal, what is that chargeable to?
A. Labor for mining coal is chargeable to mining expenses, but the labor used to drive the entries and support the roof of the mine, and all work done to make the mine safe, and on the tipple, would be charged properly to construction.
Q. And the freight, how is that?
A. Freight, unless it was on articles like T rails and supplies for construction, like lumber, nails, &c., would be charged to operating expenses.
Q. Was there any way that you differentiated what labor went on to the entry and what labor went into the mining?
120 A. The superintendent kept a memorandum of much of that work, and at the end of the year, sometimes at the end of each six months, a report was made and the charges made upon the books.
Q. Is there any possible way in which you can tell what labor or freight for material, for construction, included in the 1884 expense account should go to construction?
A. Yes, sir; I think it could be done if I had time enough to go through the books and make it up.
Q. Will you take the year 1883, Mr. Carlisle, and take the expense account, which is found on page 5, I believe, of the ledger, Exhibit 3, for the year 1883, with the corresponding journal entries, and state from them, if you can, for that year, what part of the items charged to expense are properly chargeable to expenses and what part are chargeable to construction?

A. I will try to do it but it will take me probably half a day.

Q. Referring again to construction account, page 1, Exhibit 3, what is the next item that you find?

A. The next item is in December, 1885, to sundries, $66,905.51, page 307 of the journal.

Q. Turn to that page, 307 of the journal, Exhibit 4; what do you find?

A. I find that construction is charged with the amount stated, and various items, consisting of entries, air and water courses, buildings, labor, &c., &c., are credited with various amounts making in the aggregate $66,903.51.

Q. Do you know how those items were originally entered on the journal and posted to the ledger?

A. They were made from reports and examinations made by the superintendent and boss miners and men connected with the works.

Q. To whom were those reports made for the purpose of keeping the books straight?

A. They were made to the general manager in connection with myself.

Q. Who was the auditor of the company?

A. We had no auditor; we had a general manager and a bookkeeper, who was practically the auditor.

121 Q. How often were the reports made as to the expenditure, expenses, constructions?

A. I think monthly.

Q. Did you have a regular form?

A. There was a regular form as to expenses and receipts.

Q. Do you remember the number of the form?

A. No, I do not; I do not know as we had any number for it, but the books were started by Mr. Rockwell, and he got up all the forms.

Q. Who made this monthly report?

A. The different persons connected with the works, as I stated before, the superintendent of the mines and mine boss and foreman.

Q. And to whom was it made?

A. It was made to the office at Ashland.

Q. And who made the entries, charging it up to either expenses or construction, or whatever account might be properly chargeable with it, entries, barges, &c.?

A. The bookkeeper made the entries.

Q. And who determined whether or not a given item in the first instance when reported should be charged to construction or expenses?

A. The superintendent, I think, was the man had charge of that.

Q. Now, when this account was closed at the end of these numerous accounts referred to in the journal, was closed by charging to construction the aggregate and crediting the various accounts of which the aggregate was composed, who determined that amount, $66,905.51, should be charged to construction—when these different

accounts of which it was made up were credited with their respective amounts?

A. That was determined by the general manager, who was at the same time the bookkeeper, and approved by me.

Q. Do you have any personal recollection of this here having come under the cognizance or under your determination?

122 A. Yes, I have a recollection that I had a good deal to do with it.

Q. Now it appears, Mr. Carlisle, that a large number of the items shown on page 307 were originally entered on the journal and posted to the ledger charged to these various accounts and credited to expense items, and also that on the monthly report of this period it reports them as expense items, not all of them but some of them; is there any way of telling, or do you know why items that were originally charged to expense should at the end of the year be charged to construction?

A. Most all of the accounts are kept in that shape, to find out where the money or how the money was expended; and at the end of the year, to determine the actual expense of operating the company, there was deducted for construction account so much as was properly chargeable to construction account of those different items, which was obtained from the memorandum kept by the superintendent or general manager.

Q. Take those items on page 307 in Exhibit 4, the first one, credit item, there is, to entries, ledger page 28, aggregating $1,265.68, that covers what period?

A. That covers six months.

Q. From when?

A. From January 31st, 1885, to July 31st, 1885.

Q. What is the first item?

A. To accounts payable, $224,75.

Q. How was that item originally entered?

A. It was not originally entered to mining account north and south mine, entries driven in that mine, $224.75.

Q. And charged to what account?

A. And charged to entries.

Q. What was it credited to?

A. It was credited to accounts payable.

Q. What is the heading?

A. Sundries to accounts payable, to the amount of pay roll vouchers registered in the general office during the month of

123 January, 1885, and amounts charged out as follows, for amount of each pay roll and voucher see page 165.

Q. Then this is one of these heads under what account?

A. Under the account of entries.

Q. Entries is under what division?

A. Under the division of mining account, north and south mine. But there was no such account, kept, that was simply a heading.

Q. That was under mining accounts, north and south mine?

A. What that meant was to show where the work was done in what mine.

Q. A subdivision under that account, north and south mine, was coal mine entries, air and water courses, claims?

A. That is right.

Q. Then there was another account under this accounts payable or another heading of operating account, north and south mine?

A. Yes sir. Then there was another account making up this account payable or terminal account of north and south mine.

Q. And what else?

A. Then the general account, and construction account of old mine, and construction account general.

Q. And what is this that is shown on page 165 of this Exhibit 4?

A. It shows to whom and for what the amounts were paid on those different accounts; it is headed sundries to accounts payable for amount of payroll and vouchers registered in general agent's office during the month of January, 1885; and then each party was charged with what they were paid.

Q. Now, what you have said as to the first item, that is, under the head of entries, page 28, $224.75, is true of each of the others that make up the aggregate of $1,265.68?

A. I think so, I am positive it is so.

124 Q. Now return to page 307 of Exhibit 4, the journal, why is it, I ask you, that on the 31st of December, 1885, that account of entries is balanced by crediting to entries $1,265.68, and charging it to construction?

A. Because entries was a part of the work necessary to have the mines ready for operation and to prepare the rooms, and it is properly chargeable; all entry work is new work and all entries are properly chargeable to construction.

Q. Then why was it reported in these monthly statements that are referred to in the journal entries under the head of expense, and so entered at first under mining account in the ledger?

A. It was done to find out what was the amount of money expended on each mine either for expense of operating or expense for construction.

Q. Then why could not it have been charged in the beginning to construction and credited to mining accounts or accounts payable?

A. That was kept that way and done at the end of each year in order to close up the account and find out, and the general agent always had those things down as a memorandum ready to make them, although it was not done until the end of the year.

Q. Although it was originally entered on the journal and posted to the ledger as an expense item, at the end of the year it was charged off as a construction item?

A. Such an item as entries was never charged to expense, it was kept as an account with entries, and at the end of the year, instead of being balanced to expense it was balanced to construction account, because it was properly chargeable to construction.

Q. How about air and water course?

A. Air and water course was for several years kept in the same way.

Q. How about outside labor?

A. Outside labor had to be divided.

125 Q. You could not tell that at the end of the year, it all went to expense account?

A. That was kept separate, and that went entirely to construction, for it was in connection with the work there.

Q. And inside labor?

A. The same way.

Q. What kind of labor was that, or was that that year?

A. That was for labor—all labor except the mining of coal.

Q. What other kind of labor was there except the mining for coal?

A. The driving of these entries.

Q. That would be charged up to entries?

A. Yes; it was the putting up of timbers and props, and little things of that kind.

Q. That year outside labor was $3,609.58—what is that?

A. Well, the entry of the journal is, for the amounts charged to operating account; that properly belonged to construction account, outside labor, but it had never been charged to construction account on the ledger.

Adjourned.

Mr. John Carlisle's office.

FRIDAY, A. M., *March* 11, 1898.

Continuation of examination of Mr. JOHN CARLISLE by Mr. CLEVELAND:

Q. Have you worked out since our last meeting, Mr. Carlisle, a synopsis from the books of what goes into the construction account for the year 1884?

A. Yes, sir; I have gone over it and worked it out approximately; I may not have got all the items in, but I have got the great majority of them.

Q. Have you got it in a form in which it can be used as an exhibit?

126 A. I have it only in pencil form.

Q. Will you have it written out on a typewriter so we can get at it and have it at a subsequent meeting?

A. I have no typewriter, but I can have it written out in ink.

Q. Can you give it to the commissioner and have him copy it?

A. Yes, sir.

Q. At the close of the examination at the last meeting we were upon the construction account, and the items that were charged up on December 31, 1885; please turn to Exhibit B, page 1 that con-

struction account on the ledger and also to Journal A, page 307, which I believe is the corresponding journal entry for that year, and state how it is that of the items which go to make up the aggregate charged on that day to construction account there are items to the amount of $21,185.73 originally charged to operating expenses, a list of which you will find in Exhibit A of the testimony of Jordan Pugh?

A. Have you got that?

Q. Yes, sir.

A. (Examining the place.) The first items of entries, $1,265.68 was the amount paid for driving entries in order to get at the coal to be mined.

Q. In which mine?

A. It does not state which mine.

Q. Is there any way of ascertaining?

A. No, not now.

Q. Is there any way of ascertaining how much was realized by the company from the coal that was gotten from the entries?

A. There was but very little gotten from the entries, because most of that coal was not fit for commercial use; the coal that was sold was mainly from the rooms; there might have been a few lumps occasionally from the entries.

127 Q. The question is, is there any way of ascertaining how much the company did get from the coal gotten from the entries?

A. There is no way now.

Q. Proceed then with the explanation.

A. The probabilities are that these entries were the o[illegible] in the old mine, because on page 60 of the ledger there is, entri[illegible] r north and south mine, charged to construction account; and I think possibly the same answer will apply to all of these items here that are given for entries, with this addition, that at the end of the year the superintendent and the manager and myself went carefully over the books and eliminated what we thought was properly chargeable to construction that had not been charged to construction, but had been charged to expense. The item of engineering, $187.50, should certainly be charged to construction, because all that the engineer was employed for was to lay out the work. And the item of management, $1,000, we thought it was proper to charge that, because it had to be overlooked by the manager and superintendent.

Q. What was the total expense of management?

A. For the year!

Q. Yes.

A. It was $8,928.75.

Q. That charge, then, was purely arbitrary?

A. That was purely arbitrary, it was a very small charge. Air and water courses are made for the ventilation and draining of the mine and have to be made before any mining can be done, and they are properly chargeable to construction. Both outside and inside

labor was charged to construction, because it was mainly used for construction. The expense of mining is always shown in what is called the mining account.

Q. What kind of labor was the outside and inside labor?

A. Well, building tracks both inside and out, and furnishing cross ties, and building the tipple, and probably sidings, and a good deal of work that was done preparatory for actual mining.

128 Q. Is there any way, Mr. Carlisle, of telling what that labor was for now?

A. Not at this time, no, sir; there is no way of telling the particular kind of work that was done.

Q. Do you know, for example, whether there was any tipple built that year?

A. Yes, sir; I am positive about that.

Q. Where?

A. At the north and south mine.

Q. That is 1885?

A. It is 1885 and 1884 both together.

Q. You did not then make a contract for building tipple?

A. Oh, no; we had our own men to do that. That item of maintenance of tracks and chutes, $1,098.82, on page 144 of the journal, dated November, 1884, construction account, was charged to operating account, was credited with amounts that had been charged to operating account, that properly belonged to construction account, of which tracks and chutes was one of the items.

Q. Now look at the item where it had been charged to operating account?

A. On page 54 of the journal, under date of January 31, 1884, there was charged to construction account tracks and chutes, $1,853.84, but never was posted to construction, but was simply posted to tracks and chutes north and south mine and so on, for the different items that are charged there to tracks and chutes during that year.

Q. Is it not a fact that $1,098.82 was originally charged to maintenance tracks and chutes?

A. No, sir.

Q. What I mean is, the item in Exhibit A of Jordan Pugh's testimony states that it appears from Journal A, page 307, which is Exhibit 4, that there is an item there charged to construction account of maintenance of tracks and chutes $1,098.82; do not

129 the books show that that item was originally charged to maintenance tracks and chutes north and south mines?

A. Yes, sir.

Q. And afterwards credited to that account, tracks and chutes and charged to construction account?

A. It was because that mine was being prepared for operation, but was not in operation at that time.

Q. Why, then, was it charged to maintenance, tracks and chutes?

A. Because it was probably money expended for fixing up the

tracks and chutes, for they were laid, and had to be surfaced after they were laid.

Q. Maintenance of tracks and chutes, in the technical meaning of maintenance, was not properly chargeable to construction?

A. Maintenance to keep in repair, that would not be properly charged to construction.

Q. Please proceed to explain the items which, according to the report of Jordan Pugh, Exhibit A, were, on the 31st day of December, 1885, charged to construction account, having theretofore been charged to expense account?

A. I have explained the item of air and water courses previously, but there is another item here of air and water courses, $1,027.98, which was the work done for ventilating a branch of the old mine. Now, the item of caps and posts, $970.72, was originally charged to caps and posts north and south mine, and was properly chargeable to construction. Those caps and posts were used for the purpose of holding up the roof of the mine entries so as to prevent any accidents and keeping things clear. The item of railroad fares and expenses of German laborers from New York, $418.88, was originally charged to general expenses, but we transferred that to construction account because it was the expense we had to go to for these men we were putting in on this work of construction. Maintenance of buildings, $500, was an arbitrary charge; the total amount expended that year was $770.18, but to my recollection a
130 number of those items were paid out on account of additions made to the buildings so as to increase their capacity.

Q. Can you tell what additions or what house?

A. No, I could not now.

Q. Proceed with the different items?

A. This exploring and drilling, $167.32, was what was done to determine the best place to open coal to get it; they drilled in to find the thickness of the coal. The item was not a large one any way. That (indicating) was entries driven in the old mine; that is the amount, $758.27; air and water courses the same in the old mine.

Q. Inside labor, $2,000?

A. That was in the old mine, to get it ready for operation.

Q. What was the total expense for inside labor on the old mine for that year?

A. $2,821.91.

Q. $2,000 of that was charged to construction?

A. Yes, sir.

Q. And the rest was charged to where?

A. The rest was charged to expense.

Q. Was that estimated, or a purely arbitrary charge?

A. It was mainly estimated, the amount that should be charged to expense in order to cover about what we received for the coal that was marketed from the old mine entries.

Q. Oil and powder?

A. Oil and powder was what was used in the old mine.

Q. For what?

A. The oil was used for the lamps and the powder was used for the blasting.

Q. How much was the total expenditure for that year?

A. $496.57.

Q. How much of that was charged to construction account?

A. $300.

131 Q. And the rest?

A. To expense.

Q. Was that arbitrary, that division?

A. That was partially arbitrary the same as the other, but we estimated that there was something properly chargeable to expense for the amount of coal received out of there.

Q. The powder was used knocking down the coal, was not it?

A. It was used both for knocking down coal and for blasting the slate and clay in order to make the entries large enough.

Q. The oil, I suppose, was used in miners' lamps?

A. Yes, we had to have lamps whether miners' or others.

Q. What was the next amount?

A. Maintenance of machinery, the same answer will apply to maintenance of machinery; $500 was charged to construction out of a total of $821.15.

Q. That was arbitrary too, was it?

A. Arbitrary, partially so, as I stated, previously.

Q. Rent of barges?

A. Rent of barges was on account of barges purchased on monthly installment from the Queen City Coal and Mining Company.

Mr. TYLER: That was partially for the payment of barges.

Q. What was the total amount charged up that year for rent of barges?

A. $5,660.

Q. How was it charged?

A. Construction account was charged with $1,500 and expense account was charged with $4,160.

Q. That was an arbitrary division?

A. No, sir; it was not an arbitrary division; the $1,500 was for the monthly payment of the barges we purchased from the Queen City Coal and Mining Company; it was charged up to rent of barges when it should have been charged properly to equipment.

Q. Is there any way of showing that?

132 A. Page 164 of the journal shows that it was charged to rent of barges, $280; and on page 165 it shows it was paid to the Queen City Coal and Mining Company, $280 for rent of barges.

Q. You were renting barges from the Queen City Coal and Mining Company?

A. We rented barges, to be applied on the purchase, like car trust.

Q. The $280 a month, then, shown on the item of rent of barges, on page 143 of the ledger, Exhibit 3, which goes to make up this $1,500 credit of that account, and charged to construction account, includes, I understand you, both the use of the barges and payment of the purchase money, according to the car trust system?

A. The $280 does; yes.

Q. The total amount charged up according to that system is $1,960?

A. That is right.

Q. January 1st, 1885, and that was divided, $1,500 of that was charged to construction, and the balance for the use of the barges; is that right?

A. That is right.

Q. Explain the remaining item, please, of Exhibit A, statement of Jordan Pugh, December the 31st, 1885, which was originally charged to expense, and on the 31st day of December charged to construction account?

A. The item of caps and posts, page 38 of the ledger, $887.53, was what was used in the North and South mine, and properly chargeable to construction, as that mine was being prepared for operation. The claims were this: Where a man did extra work and he claimed extra for it, then it was charged to claims, when they were turning rooms to get ready for mining, that would properly apply to construction; that is true of the next two items, $271.64; that is, North and South mine.

Q. $768 is what?

A. Rooms turned in old mine.

Q. Maintenance of barges, $448.98?

133 A. That was paid out for repairing of barges, some barges that were got from the Queen City Coal and Mining Company in order to make them water-tight and put them in good order, and it was the barges that had not been used by us yet at that time.

Q. Is that amount really properly chargeable to construction, repairing a barge that you had already bought or were renting, keeping it water-tight?

A. It was properly chargeable to construction account from the fact before using it we had to put it in proper condition, and it would go the same as if we built new barges. If an injury to a barge had occurred while it was being used by us then it would be properly chargeable to expense.

Q. In the statement of Jordan Pugh, Exhibit A, as to the books of the mining company for the year 1885, he states that certain expense items were carried as construction items from July, 1884, to July, 1885, among other engineering, construction account, $244.35; do you know why that was charged to construction account?

A. All engineering would be properly chargeable to construction account, because the engineers had to lay off the work to be done in opening mines and turning rooms and driving entries.

Q. Clearing up old mine, $10,517.29?

A. That was paid for cleaning up what was called the old mine in order to put it in condition for mining coal, the entries had to be made very much larger and wider and higher, in order to haul the coal out. That is, the mules couldn't have got through the entries as they were; it had to be done; and then there had to be side entries driven and rooms turned before we could get any coal out for the market, and it cost that amount of money, which seems large, but the average cost of opening a new mine exceeds generally $20,000; this cost about one-half.

Q. The other items referred to in that statement, oil and powder and tools, $192.11, $71.75, and $17.10, respectively, are explainable as heretofore?

134 A. Yes, sir.

Q. Now, Mr. Carlisle, having finished this matter of this construction account up to December 31, 1885, on March 1, 1883, when the notes for $29,073.26 were given you, and also the note for $7,000, and including the years 1884 and 1885, during which time it seems the old mine was cleaned and the North and South Mine, as you call it, was in operation; can you produce the map which you have already promised to look up, and mark upon it the improvements which existed on March the 3d, 1883, on the property, the location of the mine, and the improvements which were thereafter added prior to 1889; and in order to make that intelligible, use either a different mark or a different colored ink for the different periods mentioned?

A. I can do, as far as possible what you wish, but it will be impossible to locate the houses and the improvements, because the scale is too small on the map to do it.

Q. Turn, if you please, Mr. Carlisle, to Exhibit 3, the ledger, page 1, and state what is the next item you find charged to construction account after December 31, 1885?

A. The next item is $5,889.35, charged to construction account; that would be December 31, 1886, which shows on page 80 of Journal B, which I produce.

Q. Will you please mark that journal for the purpose of identification, Exhibit 5. (The commissioner so marks it.) It appears from the report of Jordan Pugh, Exhibit A, Pugh's testimony, that of the items shown on journal, Exhibit 5, page 80, December 31, 1886, making up the construction charge, there are charged a number of items which, according to the original items in the journal posting in the ledger, page 5, were purely expense items, these items, as shown in said report, aggregating $4,998.88; how do you

135 explain the fact that those items originally charged to expense, are charged on that date to construction?

A. The same answer will apply to that as the answers given and explanation of the statement of items for 1885, that they were mainly expenses incurred in getting ready the mines for operation.

Q. How could such items as maintenance of barges, maintenance

of buildings, maintenance of tipple, be chargeable to construction account?

A. Maintenance of tipple was probably the amount expended on the tipple at the river; that was for work done upon the machinery connected with the tipple at the river at Ashland.

Q. How about the other, maintenance of barges and maintenance of buildings?

A. I think the same answer will apply that was given for the year 1885, but I can't at this date state positively about it; it is impossible at this late date to answer your question exactly.

Q. What is the next item you find on ledger, Exhibit 3, charged to construction account?

A. It is December 31, 1887, $12,322.73.

Mr. TYLER: Is that amount charged to construction account?

A. Charged to construction account that year.

Q. I notice in the statement of Exhibit A to the deposition of Jordan Pugh, in reference to that item, that he states that from Journal B, which is Exhibit 5, page 282, it appears that construction account is charged with a number of items which according to the original entries in the journal and posting in the ledger, Exhibit 5, are properly expense items, namely, engineering, $81.10; outside labor, $2,185.95; maintenance of tracks and chutes, $842.25; entries, $707.49; total, $3,816.79; can you explain, Mr. Carlisle, how it is those items originally charged as expense items were at that date charged to construction account?

A. Yes, sir; that was the year 1887, when the two mines
136 on Nat's creek, Anna and Elizabeth, were opened, and that work was all done, new work, in those two mines.

Q. And the same explanations of those items that you have made for the year 1885, apply as to the character of the work?

A. Yes, done in the north and south mine.

Q. And the same explanation as when arbitrary amounts were charged?

A. I do not think there were any arbitrary amounts charged then, because I think those accounts were kept properly then.

Q. Then exploring, drilling, caps and posts, entries prior to August 1, 1887, and entries after August 1, 1887, and lines and tackle, how do they come to be charged to construction account?

A. They are part of the new work, exploring and drilling, caps and posts and entries, and lines and tackle were for new lines and tackle for the barges bought; that would properly go to construction.

Q. What is the next item that you find in the ledger, Exhibit 3?

A. Same date, December 31, 1887, an item of $2,386.69 in the ledger, it is composed of three items, as shown on page 285 of Journal B, Exhibit 5, ice breaks, $1,392.50; live stock, $100; caps and posts, $894.19; the ice breaks were constructed that year, or partially so, at that cost, in the Ohio river at Ashland, and were cribs of timber filled with stone and put there to protect the harbor

from ice when floating in the river. The live stock was for a mule, I presume, bought. The caps and posts were bought for the Anna and Elizabeth mine, the new mines that were opened, as shown on the ledger, page 393.

Q. What is the next item in the ledger, Exhibit 3, charged to construction account?

A. Nothing.

Q. Have you the ledger that follows that?

A. Yes, sir; I here produce it and mark it for the purpose of identification Exhibit 6. (The commissioner marks it.)

137 Q. Please turn to construction account and tell us what is the first item?

A. An item of $2,212.04, December 31, 1888.

Q. In the statement of Jordan Pugh, Exhibit A, it appears, under the items there charged to construction account, and shown by Journal C (p. 40)—have — got that journal?

A. Yes, sir; I mark it Exhibit 7. (The commissioner marks it Exhibit 7.)

Q. That certain items, such as tools, are charged to construction acount; lines and tackle and ice breaks are charged to construction account; how did that come?

A. The item of tools was for a drill purchased that year, a diamond drill for boring through the different strata from the top of the mountain; I think we could go down to the depth of 800 or 1,000 feet with it and find out what seams of coal were in the hills that were not known, and that cost $255; that is probably chargeable to construction. The other tools, amounting to $37.96, were small items, valves, springs, &c.

Q. How about lines and tackles and ice breaks?

A. The same answer would apply to those that did for the year previous; it was for the same ice breaks and for new lines and tackle.

Q. They are all the items that were charged up to the construction account prior to the sale of bonds in 1889?

A. Yes, sir; but there should have been another item to construction account, which I find had never been closed into construction account, and that is the item of barges, which I find is about $21,000.

Adjourned.

138 Office of Mr. John Carlisle.

MARCH 11, 2 P. M., 1898.

Continuation of the examination of Mr. JOHN CARLISLE by Mr. CLEVELAND:

Q. Have you prepared the map marked as requested, Mr. Carlisle, since our last adjournment?

A. I have.

Q. Will you produce it?

A. Yes, sir; there it is; I make it a part of my evidence (marked Exhibit 8).

Q. Will you please explain just what the marks and figures upon it indicate that you placed upon it?

A. First in the mine on the hill overlooking the Big Sandy river, which was opened in 1856 and operated for a short time, designated as "River mine" 1856. The figures "1883" below that indicates that there was some mining done there in that year. The track for the coal cars after passing through the river hill was laid around the hill, entering another hill on the same level, and some coal mined out of that in 1856; that is designated "Mine 1856." The tunnel was driven through that hill and into another hill, where some coal was mined in 1858, and that is designated "Mine 1858." Then after passing through that hill the track went into the hill between Burges Trace and Miller's branch, and the tunnel was driven through that hill, but no coal was ever mined; that place was designated as "Old mine" from the fact of this tunnel having been driven through years ago, and it was opened, cleaned up and put in order for mining during the years 1883, '4 and '5, and so designated on the map with a mark south of that, designated as "New entry to the old mine" which was done in 1884. There are marks on the map opposite to the old mine of tipple; that is where the tipple was put to load coal from the mine on to the railroad cars, and the tracks are designated on the maps showing where the cars stood; that tipple was built in 1883.

139 Then on the Mill branch of Miller's creek in 1884 and 1885 there were mines opened on the north and south side of that branch and a tipple built there, and designated as "N. M.," meaning North mine, 1884, and '5, and "S. M.," meaning South mine, 1884 and '5. Then down towards Nat's creek, and on Nat's creek, there were two mines opened, one on the north side and one on the south side, in 1887, and a tipple constructed there, known and designated on the map as "Anna mine, 1887," and "Elizabeth mine, 1887." The Elizabeth mine, in my deposition, by mistake on my part, has been designated as "Emma mine," when it should have been designated as "Elizabeth mine."

Q. So that, Mr. Carlisle, from 1858 to 1883 there was no mining of this property?

A. No, sir, except what was required for the domestic use in the neighborhood; that was incidental.

Q. Now, as I remember your testimony, about 1880 or 1881 the improvements began in the anticipation of the building of the Chattaroi road up to this property?

A. I think that the best evidence of when any work was done would be by referring to the records of the mining company. I do not know exactly when the work did begin.

Q. Will you look at the minutes of the directors' meetings and see if you can refresh your recollection as to that?

A. Yes, sir; I find on referring to the minutes of the company that the work was begun in 1881 and carried on through 1882.

Q. Now, as to the time in 1881, when the work was first taken up, and before any new work had been done, state briefly as you can what improvements were upon the property besides the entries and mines you have already described?

A. There were several houses, but how many I cannot state.

Q. Where?

140 A. Some on the river bank and some on Miller's branch, but those on Miller's branch were of no use; those that were of any account at all, they were in fair condition—were on the river bank—on what is called Old Peach harbor, on the banks of the Big Sandy river, and there were a storehouse and barns and a fine dwelling.

Q. Was there a tipple?

A. No, sir; the tipple had been destroyed; there had been a tipple there.

Q. Where?

A. Right at the river.

Q. Was there any tipple over on Miller's branch?

A. No, sir.

Q. Was there a track from the river mine through these hills you have described over to Miller's branch?

A. There were the remains of a track.

Q. How much mining had been done outside of the river mine?

A. That I do not know, as I never have made an exploration of them.

Q. Had the main entry been driven clear through to Miller's branch, where the railroad afterwards came?

A. Yes, sir.

Q. After you commenced to make these improvements in 1881, which you have already described, what was the first thing you did with the money raised at that time, in reference to which you have testified?

A. Well, there was the building of houses over on Miller's branch—miners' houses.

Q. How many?

A. Up to 1883 there was between forty and fifty miners' houses built, and there was a store, a frame one, and hotel or boarding-house.

Q. Where was the frame one put?

A. Down there on Nat creek, near where the present brick store is.

Q. The hotel is on the map, Exhibit 8, marked "Hotel,"

141 and the store on the opposite side of the railway and run?

A. Yes, sir.

Q. Was anything else built during that time, before the railroad came through?

A. Well, by the time the railroad had gotten through we had the

tipple constructed at the old mine to load cars, designated on the map as "Old Mine tipple."

Q. And what else was done?

A. There was a great deal of entry work done—entries given.

Q. Where?

A. In the north mine, mainly, and the old mine had entries driven and was thoroughly cleaned out ready for work.

Q. Was that before the railroad got through?

A. That work on the old mine? No, it was not before the railroad got through, because we did not have money enough to do it; that was one of the reasons why I persuaded the Harrises to buy out my associates, so as to have some live men in to help us.

Q. Had the work begun on the old mine cleaning it out?

A. Yes, sir.

Q. When were the north and south mines opened?

A. In 1884 and completed in 1885.

Q. That did not begin until the railroad came through?

A. No, sir.

Q. And until the Harrises came into the property?

A. That is right.

Q. There had been no work constructing the tipple of the north or south mine prior to 1883?

A. That is right.

Q. So that all the work that had been done between 1881, when the new improvements started, and 1883, when the Harrises came in and the railroad came through, had been done on the old
142 mine, either in cleaning it up or opening new entries, building the tipple house, or in constructing the hotel and store and miners' houses?

A. Mostly that; there was some other work done opposite the old mine; there was some work done into the north mine, but not at the point designated on the map up there by the tipple; it was done so as to use the tipple of the old mine; the entry was made almost directly opposite the old mine that was abandoned; considerable money was expended there.

Q. The tipples you speak of across the railroad were built right over the railroad, so that mining from both sides of the branch could use the one tipple?

A. Yes, sir.

Q. Was the tipple at the river ever reconstructed?

A. No, sir.

Q. So altogether since 1881, how many tipples have you built on that property?

A. We have built three.

Q. Now, after 1883, and after the road came through, the mines that were opened were which ones?

A. What is called the north and south mine and the Anna and Elizabeth mines, which are marked on the map.

Q. And the tipples for these mines were constructed at the time they were opened?

A. About that time.

Q. Was there any more improvements made besides opening those mines and tipples constructed?

A. A great many more houses were constructed.

Q. How many?

A. About fifty more.

Q. So, between 1881 and 1889, how many houses have been built there?

A. Fully a hundred.

Q. By houses you mean miner's houses?

A. Miner's houses; of course we called them all houses, whether built for the miners or officers.

143 Q. Was there a new hotel or store built?

A. No, no new hotel, but a new store.

Q. When was the new store built?

A. I cannot tell without looking it up.

Q. Was it prior to the railroad coming through?

A. Oh, no.

Q. Was it prior to 1889, the issue of the bonds?

A. I think it was.

Q. Then it was between 1883 and 1889?

A. I think so; I am not positive.

Q. Was it before or after the Anna and Elizabeth mines were opened?

A. It was after those mines were opened.

Q. So it was after 1887, then?

A. It must have been.

Q. Now, any other improvements?

A. I do not think of any except this, that all the tracks, sidings, under the tipples, and all that, were built by the mining company.

Q. Did the railroad company build any?

A. The railroad company furnished the rails only; they built the main track.

Q. Built the main track and furnished the rails for the side track?

A. Yes, sir.

Q. You had to furnish the ties and labor?

A. And grading.

Q. Who maintained them?

A. I think the railroad company maintained them.

Q. When were these new entries to the old mine made?

A. I think that was made in 1884.

Q. That was after the railroad came through?

A. Yes, I think it was.

Q. Did they connect with the old entry?

A. It was driven in to make connection.

Q. What value has a tipple, Mr. Carlisle, after a mine has been exhausted?

A. The only value then is what the old material in it would be worth.

144 By Mr. BLACK:

Q. What does that consist of?

A. That consists of timbers and iron work.

By Mr. CLEVELAND:

Q. Of what value are the caps and posts after the coal had been worked out from the mine and what becomes of them?

A. They are very frequently saved when a mine is to be abandoned, because they can be used in other places if they are not too much damaged. A mine, when it is abandoned, they take out all the coal that is left in it, that is, the pillars forming the main support of the roof; they are taken out at the back part of the mine, because they come out towards the entries; they come out gradually and let the roof tumble in, and the timbers are all saved that can be saved.

Q. What are these side entries that you speak of made for? What is the purpose of them?

A. In opening a new mine first there is driven in what is called the main entry, which is generally from six to eight feet in width, and that is driven back before any operating of the mine is done for a distance of probably a thousand yards, and off from each side of that main entry are driven side entries that may be a little narrower, just wide enough to let the cars go through, and then off the side entries are turned the rooms, and it is in the rooms where the coal is mined. There are left columns or pillars along the main entry, generally fifty feet in length, and from that to a hundred, to have them strong enough to support the roof, and the same way on the side entries; and within the opening made in these, when they have gone in far enough so as to turn rooms, they make the rooms from twenty to fifty feet in width, according to the nature of the coal, whether strong enough to support it.

Q. What do you use the caps and posts for?

A. To help support the roof.

145 Q. Where are they used?

A. In the entries, in the main entries, many in the side entries, and many in the rooms. All coal mines have what is called a slate roof, which is laminated material and apt to scale off and break down, and that is why so many accidents occur to miners, by places, large amounts of slate falling down on them and injuring them. Caps and posts are put in wherever there is a weak place to prevent such accidents; it takes an immense amount of timber.

Q. They are put in as the coal is dug out?

A. They are put in as the coal is dug out, to protect the miners. When all the coal that can be taken out in that way has been taken out, they take out the pillars of coal left standing and remove all the timbers that they can get out.

Q. Were any of these mines abandoned between 1883 and 1889?
A. I think not.
Q. What value has the tracks and cars?
A. Cars are always valuable.
Q. But the tracks, after being abandoned?
A. The rails are perfectly good at one place as well as another. The ties are cheap and it don't pay to remove them unless they are very fresh.
Q. In your testimony as to the items that went into the construction account and labor, such as outside labor and inside labor, and entries, and caps and posts, and tracks, &c., what items does that include now in the construction of these mines?
A. *All* of those items.
Q. It includes driving the original main entry, as you call it?
A. Yes, sir.
Q. Does it include the side entries?
A. Yes, sir.
Q. Does it include the turning of rooms?
A. Yes, sir.
Q. Does it include putting in the caps and posts to support those things until they get ready for mining?
146 A. Yes, sir.
Q. Does it include air shafts or ventilators and water courses?
A. Yes, sir.
Q. And laying the tracks?
A. Yes, sir.
Q. And expense of tracks and rails?
A. Yes, sir.
Q. Everything in short connected with the mine except actually digging the coal out?
A. That is right.
Q. And everything made necessary by digging the coal out as you go along?
A. No, sir.
Q. Such as putting in caps and posts?
A. No, sir; after your mine is ready for operation then all caps and posts are charged to expense account, because they properly belong to that in taking the coal out. But where a new entry is driven in the same mine that is charged to construction, because that would be new work, all the caps and posts connected with that.
Q. What do you mean by turning the rooms?
A. After you have gone in with your side entry far enough to have any room made, the width is marked off and it is turned in just far enough to let the miner get to work in there without interfering with the side entry, and that is what we call turning a room.
Q. So as to make a little offset where they can stand without getting run over by the cars; is that it?
A. Yes, sir.

Q. Are most of the caps and posts used in the entries after the coal is dug out?

A. That depends a good deal on the mines; in some mines almost all of them are used in the rooms, where the roof is very firm and apt to require a very small support; but in the mines at
147 Peach Orchard, where the roof is faulty, all the entries had to be supported with caps and posts, both sides and main entries.

Q. Who drove these entries?

A. They were driven by a gang of men under the superintendence of a man named Wood at first, and then a man named Hall; after that a man named Eppling.

Q. Were they a distinct body of men from the miners?

A. Yes, sir, except this, they were miners; they were distinct from the miners who were working coal for the market they were a set of men employed just for that purpose.

Q. Who was the superintendent of this property from 1883 to 1889?

A. The one we had first was Mr. Richardson, who became the vice-president, then a man named Geo. Hall, then Mr. Oliphant, who constructed these miner's houses; they were constructed by the company not under contract, but by purchasing material and erecting them and hiring the skilled labor to do it.

Q. Who superintended that?

A. The superintendent of the company.

Q. Was not any one under him who had practical charge of it building them?

A. Yes, there was a man by the name of Boling; he did not have charge of it, but he was the man who looked on and saw it was done properly, he was one of the workmen.

Q. Who built the hotel and stores?

A. I think they were built by the railroad company.

Q. Did the mining company pay for them?

A. Yes, sir.

Q. Do you know who superintended that?

A. No, I do not, I think a man named Dye, I am not positive.

Q. Who built the second store?

A. The company built that.

Q. Who superintended it?

148 A. I think Mr. Richardson superintended that personally.

Q. Who had the cleaning up of the old mine?

A. That was done mainly by Mr. Oliphant.

Q. Under contract?

A. No, but under his superintendence.

Q. And who of the opening of the north and south mine?

A. I think Mr. Oliphant had that too.

Q. Who built the tipple of the old mine?

A. That was done under the superintendence of Mr. Oliphant.

Q. And the North and South mine?

A. I think by the same party.

Q. And who opened the Anna and Elizabeth mine?

A. I do not remember now who did open those; I do not remember just when Mr. Oliphant left.

Q. Do you know who built the tipple?

A. I do not; I know this: Mr. Oliphant, I think, had left about that time and Mr. Phelps looked after a good deal of the work, but I think Mr. Richardson was the main man to attend to all that work, but who he employed to do that I do not remember.

By Mr. BLACK:

Q. Did not you have a man by the name of Johnson up there?

A. Yes, Mr. L. S. Johnson; he was the superintendent that looked after the Anna and Elizabeth mine.

Q. And Mr. Thomas?

A. Mr. Thomas was not—that is, he was with the railroad company.

By Mr. CLEVELAND:

Q. The $29,000 and the $7,000 that you loaned the company, and the $20,000 that Anderson, Schoernberger and Bowler loaned the company prior to 1883 was the money with which these im-
149 provements you have spoken of as having been made prior to that time were paid for?

A. Yes, sir.

Q. And then the subsequent improvements that were made were made as shown in the exhibits and on the books as you have already testified.

A. Yes, sir.

Q. Any expense connected with the mines after the entries were driven, tracks laid, the air and water courses provided for and the rooms turned would be properly chargeable to expense account and not construction, whether caps and posts for holding up the roof or any other thing made necessary by taking out the coal?

A. Yes, sir; that is right.

Mr. TYLER:

Q. You mean the rooms?

A. No, I mean in the whole mine.

By Mr. BLACK:

Q. Mr. Carlisle, upon what experience do you base your classification of those expenses; is your experience confined to the Peach Orchard mine, or did you have other experience?

A. I never had any practical mining experience excepting the Peach Orchard mine; I was educated as a mining engineer and civil engineer, and in that way I became familiar with all these classes of work you mention.

Adjourned.

Office of John Carlisle.

MONDAY MORNING, *May* 9, 1898.

Continuation of examination of Mr. JOHN CARLISLE by Mr. CLEVELAND:

Q. Mr. Carlisle, the company after 1882 or 1883 increased, I believe, its capital stock, did it not; or issued additional capital stock, did it not?

150 A. Yes, sir, it did.

Q. On how many occasions was that done?

A. It was done twice.

Q. Do you remember the year; the first time?

A. I could tell by referring to the minute book.

Q. Will you take the minute book, and refer to that?

A. It was done in November, 1887.

Q. That was the first increase?

A. That was the first increase.

Q. Have you before you the record of the proceedings that brought about that increase?

A. I have.

Q. Will you produce them and state where they appear?

A. I produce the records of the minutes of the board of directors and stockholders' meetings of the Great Western Mining and Manufacturing Company; and on page 103, at the called meeting of the board of directors, held in New York city, November 10, 1887, the secretary and treasurer reported that a large amount had been expended this year for permanent improvements out of the earnings of the company, the total for the past three years amounting to over $50,000, and then on motion the president and secretary were authorized to call a meeting of the stockholders on January 11th, at Cincinnati, for the purpose of voting on an increase of the capital stock to the amount of $50,000, to be divided *pro rata* among the stockholders of the company, the amount of net earnings expended in improvements, which was adopted unanimously.

Q. Do you remember that meeting?

A. I remember it very well.

Q. Are those minutes a correct transcript of the proceedings on that occasion?

A. So far as they go, with this exception, instead of saying the net earnings, they should have said gross earnings.

Q. Who wrote those minutes?

A. I did.

151 Q. Well, now, is there any other reference in the minutes to that increase?

A. At the meeting of the stockholders in pursuance of the call of November 10th, 1887, there was a meeting held in Cincinnati of January 11th, 1888, and the following resolutions was passed:

Whereas, there has been expended for permanent improvements

and betterments, including barges, flats, opening of new mines, machinery, &c., during the past three years the amount of $64,666.44, all of which sum has been furnished from the net earnings of this company,

Resolved, That the stockholders being entitled to the amount, the president and secretary be authorized and directed to issue five hundred shares of stock of this company, to be divided *pro rata* among the stockholders.

That appears on page 103 of the minute book.

Q. Was the stock issued in pursuance of that?

A. It was.

Q. Is there any other reference to that issue of stock?

A. I think not.

Q. When was the next issue?

A. The next issue was in the spring of 1889.

Q. What were the steps that were taken on that occasion and what was the amount of the issue?

A. On January 15th, 1889, at a meeting of the board of directors, it was stated that the item of construction account shows over $150 having been paid for improvements and betterments from the net earnings of the company, which amount properly belongs to the stockholders of this company.

Resolved, That the attention of the stockholders at the next annual meeting be called to the fact of such appropriation of the net earnings, with the request that they instruct this board what action to take.

152 That appears on page 109 of the minutes.

Then at a meeting of the stockholders, the annual meeting held on April 22, 1889, at Ashland, Kentucky, the following resolution was presented, and after consideration, was adopted:

Whereas, there have been expended for permanent improvements and betterments, including machinery, barges, flats, &c., during the years 1884, 1885, 1886, 1887 and 1888 more than $160,000, all of which sum has been furnished from the net earnings of the company, and fairly belongs to the stockholders of the company;

Resolved, That the directors of this company be and are hereby authorized and requested to direct the president and secretary of the company, to issue one thousand shares of the capital stock of the company, to be divided *pro rata* among the present stockholders of this company.

That appears on page 113 of the minutes.

Q. Was there any action taken by the board of directors?

A. Then on the same date, at a meeting of the directors, a resolution was passed by the directors to issue additional capital stock of this company to the amount of one thousand shares, to be divided *pro rata* among the present stockholders. That appears on page 119.

Q. And was that done?

A. That was done.

Q. Will you attach and make a part of your deposition the copy

of the record for the meeting of the board of directors, at New York, November 19, 1887, found on page 102 (Exhibit 9); the meeting at Cincinnati, January 11, 1888, found on page 103 (Exhibit "10"); the meeting of January 11 of the board of directors, found on page 104 (Exhibit "11"); the meeting of the board of directors on
153 January 13, 1889, found on page 109 (Exhibit 12); and the meeting of the stockholders on April 22, 1889, found on page 110, and following (Exhibit "13"), and of the directors of the same date, April 22, 1889, found on page 115 and following (Exhibit "14"), to which you have already referred in your evidence.

A. Yes, sir, I will.

Q. How was that stock divided and among what stockholders?

A. It was divided *pro rata* among all of the stockholders of record at that time.

Q. Who were they?

A. Well, there was Mr. B. D. Harris, G. D. Harris, James C. Holden, Loring Hinsdale, G. W. Carlisle and John Carlisle and C. S. Richardson.

Q. It was divided in proportion to their holding of stock?

A. I said divided *pro rata*, I meant in proportion to their holding of stock.

Q. There was also, I believe, Mr. Carlisle, a loan made by the Great Western Mining and Manufacturing Company some time in 1899?

A. You mean, a mortgage given, don't you?

Q. A loan obtained?

A. Yes, there was.

Q. When the matter of borrowing money on the part of the Great Western Mining and Manufacturing Company first come to the attention of the directors or officers, so far as you know?

A. Officially the matter was presented to the board at the meeting held April 22, 1899, but it had been under consideration by the officers of the company for a year or more previous to that time.

Q. State briefly the history of the negotiation that led up to the final consummation of the issue—when it began, what form it took, what part was taken in it by you, and what the result of your negotiations were, &c.?

A. For some time previous to that meeting, the board were aware of the necessity of providing additional capital in order to
154 increase largely the output of the mines, and the plan that was thought best to issue bonds for that purpose to the amount of about $300,000. I had several interviews with the parties in the East, without much success, until I met the firm of Elliott, Johnson & Co., early in 1889, probably February or March. I was introduced to them by the president of the Penn Mutual Life Insurance Company and had a number of interviews with them.

Q. With which one?

A. With Mr. Scott, mainly, sometimes I met Mr. Elliott; and they agreed to try to sell the bonds, but said that it would be impossible

to do anything without giving with the bonds a bonus of stock to the purchasers of the bonds, and they insisted there should be an equal amount of stock given with the bonds.

Q. That is, for each dollar of bonds a dollar's worth of stock?

A. Exactly. I told Mr. Scott that was an impossibility because our capital stock at that time was only $250,000; and it was agreed after some negotiations that we should give 50 per cent of stock; that is, give $150,000; of stock with the $300,000 of bonds. But I said to Mr. Scott at the time that the company couldn't of themselves give that stock, that they had no right, that we would have to get the stock from the shareholders; and I felt the stockholders were entitled to $100,000 more of stock, on account of the improvements and betterments, and the value that the property had obtained by reason of that expenditure on it; and it was at last agreed that they would float the bonds with an accompaniment of 50 per cent. of stock.

Q. At what price?

A. To net the company 85 cents, I think.

Q. That is, $850 of bonds?

A. $850 for each $1,000 of the bonds and stock.

Q. Now, were all these negotiations oral with Elliott, Johnson & Co.?

155 A. What I have stated was oral; there might have been some correspondence also in relation to it.

Q. Where were these conversations that you had with Mr. Scott of Elliott, Johnson & Co.?

A. They were held at Wilmington, Del., and at Philadelphia.

Q. And in what months did they take place?

A. I think March and April, 1889.

Q. Did you see him more than once?

A. Oh, yes, on several occasions.

Q. You went East for that purpose?

A. Yes, sir.

Q. Between January and April of 1889?

A. Yes, sir.

Q. What was the process by which this deal was carried out?

A. Elliott, Johnson & Co. undertook to sell the bonds and stock, and whenever there were any bonds sold they would write to me with the request to send so many bonds and so much stock. The way that the stock was obtained for that purpose was by getting the consent of all of the stockholders to sell to the bondholders so much stock *pro rata* according to their holdings at 50 cents on the dollar. At that time the Mr. Harrises were holding the majority of the stock and I requested them to furnish it all, because I felt the stock was worth a good deal more than that and I did not care about letting mine go. They declined to furnish it all; they would only furnish their proportion of it, and all the stockholders agreed to do the same; an agreement of that kind in writing was made and given to the company.

Q. Why was it necessary to have this what you speak of as bonus of 50 per cent. of stock?

A. That was done by the advice of Elliott, Johnson & Co., because they said the bonds could not be sold without it of a mining company; that they had lately succeeded in placing the bonds of a coal mining company, I think in this State, with a bonus of 100 per cent. of stock.

156 Q. What was the total amount that the $300,000 of bonds and $150,000 of stock as to net the company?

A. Well, it would net the company about $175,000.

Q. $255,000 was not it?

A. As the bonds were 85 cents on the dollar, had there been no other expenses, it would have netted $255,000, but there were a great many expenses.

Q. What was the total amount that the company received from Elliott, Johnson & Co.?

A. I will have to look at the books to see that.

Q. Do not you in fact know, Mr. Carlisle, it was all carried through?

A. But I do not know the exact amount without looking. Let me see, maybe I have a statement here. (He takes a paper from his desk.) Yes, this is taken right from the books.

Q. You testified four years ago without a paper perfectly accurately. Here is your deposition made in the other case, perfectly clear.

A. At that time I didn't state what expenses had been paid and charged to bond account; I simply stated the net amount received from Elliott, Johnson & Co.

Q. What was the amount received for these bonds and this stock?

A. According to my recollection about $255,000.

Q. Were $300,000 of bonds and $150,000 of stock delivered to Elliott, Johnson & Co.?

A. Yes, sir.

Q. All of it?

A. No, I think there was $5,000 or something like that, that I took.

Q. That you sold here in Cincinnati?

A. That I sold here in Cincinnati.

Q. $5,000 of bonds and $2,500 of stock?

A. Yes, sir.

Q. Who furnished you the names to whom to send the bonds and issue the stock?

A. Elliott, Johnson & Co.

157 Q. Did you get stock certificates from the old stockholders?

A. I did.

Q. Were they surrendered to the company?

A. They were surrendered and new stock issued in place of it to the parties named by Elliott, Johnson & Company.

Q. Have you got a stock register showing those transfers?

A. I did have but I do not know where it is.

Q. I show you a paper attached to your deposition formerly given in The Great Western Mining and Manufacturing Company case, Woodward, assignee, *vs.* The Great Western Mining and Manufacturing Company, and ask if you remember at that time to have furnished this book—register of transfers of stock made at that time from the original book—to your deposition?

A. (Indicating.) That I think is a copy, which I remember I furnished at a previous deposition taken.

Q. Showing all transfers from the original—from 1863 to date—to 1893?

A. That is the date of the certificate; that date of the transfers was 1884.

Q. As I understand, this exhibit which I show you is a copy of the register of transfers of stock of the Great Western Mining and Manufacturing Company from its organization until the date that it suspended business.

A. No, it is not, because there is no transfer of stock of Bowler, Schoernberger and Anderson in that. This is from 1884.

Q. That was at the time of the reorganization?

A. Yes, sir.

Q. Will you make a copy of this as a part of your deposition?

A. I do so, and hereby attach the same hereto, and mark it for the purposes of identification, Exhibit "15."

158 Q. Have you your correspondence, Mr. Carlisle, with Elliott, Johnson & Company, your letter books, showing your copies of letters sent by you, and your files, showing letters received from them?

A. I looked for them after receiving the notice from you about the taking of my deposition, but couldn't find them, and then I remembered that they had all been submitted at the time that my deposition was taken in 1894, and I presume they were never returned to me.

Q. Have you got any letters Mr. Carlisle, from Elliott, Johnson & Co., received in 1889?

A. I do not think I have, I think they were all left over there.

Q. Have you looked through your letter file?

A. I have looked thoroughly.

Q. And have you not found a letter from Elliott, Johnson & Co.?

A. I have found some letters of Elliott, Johnson & Co., of 1892 and 1893, but not in reference to this.

Q. But none in 1889?

A. No.

Q. Have you copies of any letters written by you to Elliott, Johnson & Co., in 1889 in your letter press copy book?

A. Every letter I wrote to Elliott, Johnson & Co. was copied in my letter press copy book, and I have made a search for that without result. I will make a further search, however, and if possible, will get it.

Q. I show you two letters, dated Wilmington, Del., April 18,

1889, and Wilmington, Del., April 15, 1889, respectively purporting to be copies of letters addressed to you, and signed Elliott, Johnson & Co., and ask you to read those letters and state if they are correct copies of letters received by you?

A. Yes, sir; those are correct copies.

Mr. TYLER: I enter a formal objection to all testimony calling for conversation and correspondence between Mr. Carlisle
159 and Elliott, Johnson & Co., and also all exhibits of such correspondence and the exhibits showing transfers of stock.

Mr. CLEVELAND: With waiving said objection as to the materiality, competency and relevancy of the evidence above referred to it is agreed by counsel for the respondents and complainant that in order to save time and unnecessary trouble, the copies of the correspondence which took place between John Carlisle and Elliott, Johnson & Co., during the year 1889, which was testified to by John Carlisle in a deposition given in January 1894 on the case of Samuel Woodward, assignee, *vs.* The Great Western Mining and Manufacturing Company *et al.*, No. 1799, pending in the United States circuit court, district of Kentucky, made by the special master, be copied and attached hereto, and made a part hereof, with the same force and effect as if the original were produced and copies taken from them, subject, however, to the above objections as to competency, relevancy and materiality.

Mr. TYLER: I have no objection to that.

Mr. CLEVELAND: In pursuance of said stipulation, the following letters are hereto attached and made a part hereof, to wit, letter dated Wilmington, Del., April 18, 1889, addressed to John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "16"; letter of April 15, 1889, Wilmington, Del., addressed to Mr. John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "17"; letter dated Wilmington, Del., April 17, 1889, addressed to Mr. John Carlisle, signed Elliott, Johnson & Co., which is attached as Exhibit "18"; letter dated Wilmington, Del., April 22, 1889, addressed to Mr. John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "19"; letter dated Wilmington, Del., April 23, 1889, addressed to Mr. John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "20"; letter dated Wilmington, Del., April 24, 1889, addressed to Mr. John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "21"; letter dated Wilmington, Del., April 26, 1889, addressed to Mr.
160 John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "22"; letter dated Wilmington, Del., April 29, 1899, addressed to John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "23"; letter dated Wilmington, Del., April 27, 1889, addressed to Mr. John Carlisle, marked Exhibit "24"; letter dated Wilmington, Del., April 5, 1889, addressed to Mr. John Carlisle, marked Exhibit "25"; letter dated May 10, 1889, Wilmington, Del., May 10, 1889, addressed to Mr. John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "26"; letter dated Wilmington, Del., May 14, 1889,

addressed to Mr. John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "27"; letter dated Wilmington, Del., June 8, 1889, addressed to Mr. John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "28"; letter dated Wilmington, Del., June 10, addressed to Mr. John Carlisle, treasurer, Cincinnati, Ohio, signed Elliott, Johnson & Co., marked Exhibit "29"; letter dated Wilmington, Del., June 10, 1889, addressed to Mr. John Carlisle, treasurer, Cincinnati, signed Elliott, Johnson & Co., marked Exhibit "30"; letter dated Wilmington, Del., June 12, 1889, addressed to John Carlisle, treasurer, Gt. Western Mining and Manufacturing Company, signed Elliott, Johnson & Co., marked Exhibit "31;" letter dated Wilmington, Del., June 13, 1889, addressed to Mr. John Carlisle, treasurer, Cincinnati, Ohio, signed Elliott, Johnson & Co., marked Exhibit "32"; letter dated Wilmington, Del., June 14, 1889, addressed to Mr. John Carlisle, treasurer, Cincinnati, signed Elliott, Johnson & Co., marked Exhibit "33"; letter dated Wilmington, Del., June 13, 1889, addressed to Mr. John Carlisle, Great Western Mining and Manufacturing Company, signed Elliott, Johnson & Co., marked Exhibit "34"; letter dated Wilmington, Del., June 15, 1889, addressed to John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "35"; letter dated Wilmington, Del., June 17, 1889, addressed to Mr. John Carlisle, treasurer, signed Elliott, Johnson & Co., marked Exhibit "36"; letter dated Wilming-
161 ton, Del., June 19, 1889, addressed to Mr. John Carlisle, treasurer, signed Elliott, Johnson & Co., marked Exhibit "37"; letter dated Wilmington, Del., June 24, 1889, addressed to Mr. John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "38"; letter dated Wilmington, Del., June 20, 1889, addressed to Mr. John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "39"; letter dated Wilmington, Del., June 28, 1889, to Mr. John Carlisle, treasurer, signed Elliott, Johnson & Co., marked Exhibit "40"; letter dated Wilmington, Del., June 3, 1889, addressed to John Carlisle, treasurer, signed Elliott, Johnson & Co., marked Exhibit "41"; letter dated Wilmington, Del., June 5, 1889, addressed to Mr. John Carlisle, treasurer Great Western Mining and Manufacturing Company, signed Elliott, Johnson & Co., marked Exhibit "42"; letter dated Wilmington, Del., June 6, 1889, addressed to Mr. John Carlisle, treasurer, signed Elliott, Johnson & Co., marked Exhibit "43"; memorandum dated June 1, 1889, from Elliott, Johnson & Co., to Mr. John Carlisle, secretary, signed Elliott, Johnson & Co., marked Exhibit "44"; letter dated Wilmington, Del., July 1, 1889, addressed to Mr. John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "45"; letter dated Wilmington, Del., July 1, 1889, addressed to Mr. John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "46"; letter dated Wilmington, Del., July 2, 1889, addressed to Mr. John Carlisle, treasurer, signed Elliott, Johnson & Co., marked Exhibit "47"; letter dated Wilmington, Del., July 3, 1889, addressed to Mr. John Carlisle, Cincinnati, Ohio, signed Elliott, Johnson & Co., marked Exhibit "48"; letter dated Wilmington,

Del., July 3, 1889, addressed to Mr. John Carlisle, treasurer, signed Elliott, Johnson & Co., marked Exhibit 49"; letter dated Wilmington, Del., July 6, 1889, addressed to Mr. John Carlisle, treasurer Great Western Mining and Manufacturing Company, signed
162 Elliott, Johnson & Co., marked Exhibit "50"; telegram dated Wilmington, Del., July 11, 1889, addressed to Mr. John Carlisle, room 37, Carlisle building, signed Elliott, Johnson & Co., marked Exhibit "51"; letter dated Wilmington, Del., July 11, 1889, addressed to Mr. John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "52"; memorandum dated Wilmington, Del., July 18, 1889, not addressed, not signed, marked Exhiibt "53"; letter dated Wilmington, Del., July 20, 1889, addressed to Mr. John Carlisle, treasurer, signed Elliott, Johnson & Co., marked Exhibit "54"; letter dated Wilmington, Del., July 20, 1889, addressed to Mr. John Carlisle, treasurer, signed Elliott, Johnson & Co., marked Exhibit "55"; letter dated Wilmington, Del., July 22, 1889, addressed to Mr. John Carlisle, Cincinnati, Ohio, signed H. P. Scott, marked Exhibit "56"; letter dated Wilmington, Del., July 24, 1889, addressed to Mr. John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "57"; letter dated Wilmington, Del., July 29, 1889, addressed to Mr. John Carlisle, treasurer, signed Elliott, Johnson & Co., marked Exhibit "58"; letter dated Wilmington, Del., August 1, 1889, addressed to Mr. John Carlisle, Cincinnati, Ohio, signed Elliott, Johnson & Co., marked Exhibit "59"; letter dated Wilmington, Del., August 8, 1889, addressed to Mr. John Carlisle, Cincinnati, Ohio, signed Elliott, Johnson & Co., marked Exhibit "60"; letter dated Wilmington, Del., July 25, 1889, addressed to Mr. John Carlisle, treasurer, Cincinnati, Ohio, signed Elliott, Johnson & Co., marked Exhibit "61"; letter dated Wilmington, Del., August 17, 1889, addressed to Mr. John Carlisle, treasurer, Cincinnati, Ohio, signed Elliott, Johnson & Co., marked Exhibit "62"; letter dated Wilmington, Del., September 9, 1889, addressed to Mr. John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "63"; letter dated Wilmington, Del., September 13, 1889, addressed to Mr. John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "64"; letter dated Wilmington, Del., September 16, 1889, addressed to Mr. John Carlisle, treas-
163 urer, signed Elliott, Johnson & Co., marked Exhibit "65"; letter dated Wilmington, Del., September 20, 1889, addressed to Mr. John Carlisle, signed Elliott, Johnson & Co., marked Exhibit "66"; letter dated March 16, 1889, addressed to Elliott, Johnson & Co., Wilmington, Del., signed by John Carlisle, marked Exhibit "67"; letter dated March 23, 1889, addressed to Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, marked Exhibit "68"; letter dated March 27, 1889, addressed to Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, marked Exhibit "69"; letter dated April 1, 1889, addressed to Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, marked Exhibit "70"; letter dated April 13, 1889, addressed to Elliott, Johnson & Co., Wilming

ton, Del., signed John Carlisle, marked Exhibit "71"; letter dated April 15, 1889, addressed to Messrs. Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, marked Exhibit "72"; letter dated April 16, 1889, addressed to Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, marked Exhibit "73"; letter dated April 19, 1889, addressed to Elliott, Johnson & Co., 612 Marked street, Wilmington, Del., signed John Carlisle, marked Exhibit "74"; letter dated April 26, 1889, addressed to Messrs. Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, marked Exhibit "75"; letter dated April 21, 1889, addressed to Elliott, Johnson & Co., signed John Carlisle, marked Exhibit "76"; letter dated April 24, 1889, addressed to Elliott, Johnson & Co., signed John Carlisle, marked Exhibit "77"; letter dated April 25, 1889, addressed to Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, marked Exhibit "78"; letter of April 27, 1889, addressed to Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, sec., marked Exhibit "79"; letter dated April 27, 1889, to Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, marked Exhibit "80"; letter dated April 29, 1889, addressed to Elliott, Johnson & Co., signed John Carlisle, marked Exhibit "81"; letter
164 dated May 1st, 1889, addressed to Messrs. Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, marked Exhibit "82"; letter dated May 2, 1889, addressed to Messrs. Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, marked Exhibit "83"; letter dated May 4, 1889, addressed to Messrs. Elliott, Johnson & Co., signed John Carlisle, marked Exhibit "84"; letter dated May 6, 1889, addressed to Messrs. Elliott, Johnson & Co., signed John Carlisle, marked Exhibit "85"; letter dated May 8, 1889, addressed to Messrs. Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, marked Exhibit "86"; letter dated May 11, 1889, addressed to Messrs. Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, marked Exhibit "87"; letter dated May 13, 1889, addressed to Messrs. Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, marked Exhibit "88"; letter dated May 16, 1889, addressed to Messrs. Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, marked Exhibit "89"; letter dated May 18, 1889, addressed to Messrs. Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, marked Exhibit "90"; letter dated June 5, 1889, addressed to Messrs. Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, marked Exhibit "91"; letter dated June 6, 1889, addressed to Messrs. Elliott, Johnson & Co., Wilmington, Del., signed John Carlisle, treasurer, marked Exhibit "92."

Q. Mr. Carlisle, have you the resolutions that provide for the issue of these bonds, and the report of the proceedings of the board of directors and stockholders authorizing the loan?

A. They are in the minute book of the company.

Q. Will you identify the minutes that refer to that transaction.

A. Yes; at a meeting held April 22, 1889, of the stockholders, there was a resolution passed, which appears on page 114 of the

minutes, authorizing the directors to negotiate a loan of
165 $300,000 and issue bonds, a copy of which said minutes has already been offered in evidence. The same date the board of directors adopted a resolution authorizing the issue of bonds for $300,000, which appears on page 115, and the following of the minute book which has already been offered in evidence on a different connection. And at the meeting of the directors held May 13, 1889, further proceedings were taken in regard to the loan and the proposition of the stockholders was accepted to sell their stock in connection with the bonds to the amount of 1,500 shares, a copy of which said minutes of said date I hereto attach and make a part of this my deposition, and mark it Exhibit "93," page 121.

Q. Mr. Carlisle, who prepared those resolutions?

A. I believe Mr. Tyler prepared those resolutions, but they were all sent to Elliott, Johnson & Co., for their approval, before being adopted.

Q. What resolutions do you refer to as having been sent to Elliott, Johnson & Co., those mentioned in your letters?

A. Those mentioned in my letters; any relating to the issue of bonds and the form of a mortgage.

Q. You do not mean that the resolutions referred to in the meeting of the board of directors of May the 3d, 1889, on page 121, as to how the stock should be supplied were sent Elliott, Johnson & Co., do you?

A. No, that was not sent to them.

Q. Have you, Mr. Carlisle, the original papers—these resolutions and other papers in connection with this deal?

A. I don't think I have.

Q. Have you looked for them?

A. I have looked for them several times.

Q. Where are the papers of the Great Western Mining and Manufacturing Company?

A. They must be up at Ashland, or were.

Q. These treasurer's papers were kept by you, were they not?

A. They were always sent up to Ashland after I got them.
166 I can make further search, however, for these things. The original resolutions, after being transcribed on the minutes were probably destroyed, as we considered the record on the minute book as being the original.

Q. Did you have some correspondence during the period of this negotiation with Elliott, Johnson & Co., with Mr. B. D. Harris and G. D. Harris about it?

A. Why, I certainly had some correspondence about it.

Q. Were they out here when the matter was finally put through by the stockholders' meeting and directors' meeting at Ashland?

A. I think they were; the minute books will show who were present at the meetings.

Q. These letters you got from Elliott, Johnson & Co., which have

been offered in evidence, that you have identified, were they familiar with the contents of these letters?

A. I notified Mr. Harris whenever I received any remittances from them; I also notified him of the substance of their letters, I do not think I ever sent him copies of them.

Q. Well, all the stockholders and directors at the time these different resolutions which are referred to were put through were fully cognizant of the state of the negotiations and just what was being done?

A. They certainly were.

Q. You did not mislead them as to anything that was taking place between you and Elliott, Johnson & Co.—you told them fully?

A. Yes, sir; I did.

Q. When did I understand you, Mr. Carlisle, the matter of issuing $300,000 of bonds was first broached by the directors or stockholders of the Great Western Mining and Manufacturing Company, not formally, but informally, any time, when it was first broached?

167 A. Well, it was first talked about probably in the early part of 1888.

Q. That is over a year before it was actually done?

A. Yes.

Q. And who had taken part in those negotiations to accomplish the result?

A. I was the one that attended to the whole matter.

Q. Had Mr. Harris taken any part in attempting to float the bonds?

A. No, he had not; I reported to him what I was doing and he simply agreed with me.

Q. Up to the time you met Elliott, Johnson & Co., had not Mr. Harris himself tried to negotiate bonds?

A. No, I think not.

Q. Have you any letters you received from Mr. Harris during this period?

A. I must have; yes.

Q. Will you produce them?

A. If it is necessary, certainly.

Q. We would be very glad to see them.

A. It will take me some time to hunt them up.

Q. Will you pick them out for 1887, 1888 and 1889 with reference to the loan?

A. Yes, sir.

Q. I wish you would get the books of the Great Western Mining and Manufacturing Company, Mr. Carlisle, for this period of 1889? I want to ask you some questions; get the ledger and journal. Will you please turn to your account on page 396, Ledger B of the Great Western Mining and Manufacturing Company, and tell me what account that is?

A. (Turning to the page.) That is the treasurer's account.

Q. Of what?

A. Of the sale of the bonds.
Q. Which bonds?
A. Well of the $300,000 bonds.
Q. What is the first item and what is its date?
168 A. The first item is April 1st, 1890.
Q. Read it?
A. To sinking fund bond acc't $262,000.
Q. Now will you refer to the journal and tell what that item represents?
A. (Doing so.) On page 180 of the journal it says: Treasurer's account is indebted to 262 bonds sold from June, 1889, to March 7th, 1890, Nos. 1 to 263, $262,000.
Q. What is meant by that credit to sinking fund bond account?
A. It means bond account, not sinking fund bond acc't, and is put to the credit of the bond account, found on page 396 of the ledger.
Q. Below the treasurer's account?
A. Below the treasurer's account; that would also show the amount of bonds outstanding all the time.
Q. The bond account shows the amount of bonds outstanding all the time?
A. Yes, sir.
Q. Referring to the treasurer's account, what is the next debit item?
A. Surplus earnings.
Q. Read the entry.
A. Entry of journal on page 180—first it says on the ledger, April 1st, to surplus earnings, $2,242.42. Now on the journal the entry is the amount of interest accumulated on the above bonds sold.
Q. Read the whole entry.
A. Treasurer to surplus earnings, to the amount of interest accumulated to the above bonds sold, $2,242.42.
Q. What does that mean?
A. That means where a party paid for the bonds, bought them; that they were sold with the accrued interest to date.
Q. What is the next entry in the treasurer's account?
A. The next entry is to bonds; October 31st, to bonds, 38, $38,000.
169 Now in the journal, pages 182, tresurer's accunt is charged and bond account is credited to the amount of 38 bonds sold by Elliott, Johnson & Co., from 263 to 300 inclusive, $38,000.
Q. And the corresponding entry?
A. Is on the same page of ledger, to the credit of bond account, $38,000.
Q. That made the full $300,000?
A. That made the full $300,000.
Q. What is the next entry in treasurer's account?
A. Under the same date, October 31st, treasurer's account is

charged with surplus earnings $557.99; and the entry in the journal, on page 182, treasurer's account is charged and surplus earnings is credited with the amount of interest accumulated on bonds, $557.99.

Q. So that the treasurer's account, page 396, represents the principal and accrued interest received from the sale of these bonds?

A. That is right.

Q. Now take the credit side and state what those entries are?

A. April 1, 1890, credited by bond expenses, $116,666. The corresponding entries on the journal, page 180, are, bond expense account to treasurer, for commission paid Elliott, Johnson & Co., for selling 262 bonds, No. 1 to 262, inclusive, $39,300; paid Prof. Wetherby's fee as expert for examining property, $350; paid Mercantile Trust and Deposit Company of Baltimore, certifying 300 bonds, $300; paid S. B. Huey, of Philadelphia, passing on deeds of trust, $10; paid notary for acknowledging signatures to bonds, $400; registering bonds, $60; lithgraphing bonds, $196; blue print and maps, $10; paid E. Vernon, drawing papers, &c., $430; paid Henderson, Achert & Co., printing stock, $20; A. H. Pugh, printing, $91; R. Taylor, preparing deeds of trust, $250; sundry telegrams, $5; traveling expenses, $300; return to stockholders for 1,500 shares of stock to issue to new bondholders, as per agreement of May 3, 1899, $75,000. Now in the ledger there is an item to the credit of treasurer's ac-
170 count, dated April 1, by first mortgage bonds, $60,000. On the journal, page 180, first mortgage bond is charged and treasurer's account is credited for redemption of 60 bonds $60,000. On the ledger treasurer's account is credited, same date, with surplus earnings, $1,909.16. On page 131 of the journal the surplus earnings is charged and treasurer's account is credited with the amount of interest on bonds to Graham, $1,500, and interest on advance payment made by Graham, $409.16, making a total of $1,909.16. On same page of the ledger treasurer's account is credited the same date by John Carlisle, treasurer, $30,000. The journal entry on page 181 is, John Carlisle to treasurer, for amount of advances September 9, 1889, $7,500; amount of advances December 1, 1889, $10,000; amount of advances January 1, 1890, $7,500; amount of advances March 20, 1890, $5,000.

Q. Do you know what those advances were for, Mr. Carlisle?

A. Why, they were moneys I received from the sale of bonds which I sent up to Ashland to be used for the operation of the company, that is, for working capital. The next item in the ledger is treasurer's account, the same date, is credited by sundries, $26,572.94. In the journal entry, page 181, sundries to treasurer John Carlisle is charged and treasurer's account is credited—we paid out of proceeds of bonds a balance due J. C., January 1, 1889, and interest one year, $5,416.37—John Carlisle, treasurer, is charged and treasurer's account credited with amount paid out of proceeds of bonds. Balance due J. C., January 1, 1889, and interest one year, $21,156.57. In the ledger treasurer's account is credited with bond expenses, $5,700.

The journal entry, page 182, is bond expense, debtor to treasurer's account for amount of commission on 38 bonds sold by Elliott, Johnson & Co., $5,700. The next item to the credit of treasurer's account on the ledger, the same date, is bills payable, $44,491.96.

On the journal, page 182, bills payable is charged and
171 treasurer's account credited for the amount of four notes given to John Carlisle in 1889 and taken up by treasurer—first note, $12,720; second note, $12,000; third note, $12,775.96, fourth note, $7,000. The next item on the ledger is to the credit of the treasurer's account, same date, by interest, $3,392.61. On the journal, page 182, interest is charged and treasurer's account is credited for amount of interest on the above four notes, on $12,000, $1,440; interest on note of $12,771, $1,532.61; interest on $7,000, $420; total, $3,392.61. The treasurer's account is credited on the ledger, the same date, with surplus earnings, $8,779.50. On the journal, page 182, the entry is, surplus earnings to treasurer's account, for amount of commission on coal sales for 1888 and 1889, 175,590 tons, at 5 cents, as salary, $8,779.50.

Q. Did that go to you?

A. What went to me? On the ledger, the treasurer's account, the next and last item is a credit, John Carlisle, treasurer $5,288.24. On page 331 of the journal the item is John Carlisle, treasurer, charged treasurer's account, credited with the amount of balance of treasurer turned in to working capital, $5,288.24.

Q. That balances the account?

A. That balances the account.

Q. The next account below that is bond account; it shows the bonds outstanding?

A. That is right.

Q. The account below is the bond expense account, which shows the expense in connection with the sale of the $300,000 of bonds?

A. That is right.

Q. The account on page 366 of the ledger, called first mortgage bonds, refers to the $60,000 of bonds?

A. Yes, sir.

Q. All these accounts, the four accounts referred to appear to have been charged on the same day, Mr. Carlisle, April 1, 1890?

A. Yes, sir.

172 Q. I notice, looking at the journal, beginning on page 180 that day, that all those entries down to page 182, seem to have been made at the same time; do you remember about that?

A. Yes, sir; and dictated by me.

Q. There is a memorandum there "Dictated by J. C.;" does that mean you?

A. That means me.

Q. And you dictated them all at once?

A. Yes, sir; I had to show the bookkeeper how to make those entries properly, so as to know what the expenses had been in connection with the bond sales, and to show the indebtedness of the

company on its mortgaged bonds; he was not familiar with that kind of work.

Q. Will you attach to your deposition, and make a part thereof, transcripts of the ledger and the corresponding journal entries showing treasurer's account, bond account, bond expense account, and first mortgage bond account, found on pages 396 and 366 of the ledger, respectively, and mark the same Exhibits 94, 95, 96 and 97—the four accounts there?

A. I do; the same are hereby attached and marked respectively Exhibits 94, 95, 96 and 97.

Adjourned for noon recess.

AFTERNOON.

Continuation of examination of Mr. JOHN CARLISLE by Mr. CLEVELAND:

Q. Mr. Carlisle, referring to the minutes of the meeting of May 13, 1889, found on pages 121 to 124 of the records, I notice that the stockholders signed B. D. Harris, 450 shares; G. D. Harris, 450 shares; John Carlisle, 336 shares; George S. Richardson, 39 shares; G. W. Carlisle, 225 shares, a total of 1,500 shares; was that the proportion in which the stock was contributed by the stockholders?

A. It was.

173 Q. Was this $75,000 paid out by you as treasurer, paid to the parties named in the proportion there indicated?

A. It was.

Q. How did you arrive at the valuation of 50 cents a share of the stock contributed?

A. That is what we agreed to take for our stock; we considered then we were giving away 50 per cent. more.

Q. How did you arrive at the amount, 50 cents on the dollar, do you remember?

A. It was just simply an agreement, we would sell at 50 cents on the dollar for that purpose, thereby giving up one-half of the value of the stock.

Q. Why did not the directors increase the capital stock?

A. Because there was no reason for increasing the capital stock; we thought the capital stock was large enough, including the bonded debt.

Q. Had there been any dividend paid on the stock?

A. Yes, there had been two or three small dividends paid.

Q. Of what per cent.?

A. The last year there was a dividend paid of 4 per cent.

Q. What year do you mean?

A. I mean the year 1888—and it was continued then until 1892.

Q. Were dividends paid up to 1892?

A. There were.

Q. On all the stock?

A. On all the stock.

Q. Did you receive dividends?

A. My share of the dividends I treated as an indebtedness as a loan to the company, I did not take mine in cash; in other words, I was credited with that amount.

Q. Where?

A. I think on their books; I charged the company that amount.

Q. Did your brother take any dividend?

174 A. He and I did the same way, we both the last year allowed our dividends to accumulate and did not draw them.

Q. Did you take any dividends after 1889?

A. Oh, yes; I did.

Q. Were any dividends paid or declared by the board of directors after 1889 except to the people who had purchased these bonds and stock?

A. Yes, sir; the books will show they were paid regularly most of them on them; the only ones, my brother and I let our accumulate.

Q. Will you find where that was?

A. Well, in 1888.

Q. I am talking about after this, 1889?

A. Oh, I will have to look at the books for that.

Q. You will *din*, Mr. Carlisle, I think, you and your brother did not take any dividends from 1889 on, and that after eighteen months after 1889 none of you did, excepting those that bought the stock and bonds; at least that was your testimony before?

A. Yes, after January, 1891, we only paid the dividends in cash to the stock that went with the bonds.

Q. Did you between those dates?

A. Yes, up to January the 1st, 1890, I got mine sometimes I know; I think up to that time the dividends had all been paid to every stockholder. I remember of taking of mine, of getting my cash. Well, you can say that the dividends were paid regularly every quarter up to July 15th, 1892, to all the stockholders, excepting B. D. Harris and G. D. Harris, H. P. Scott, A. S. Elliott, G. W. Carlisle and myself. Holden and Richardson, and my impression is that all those names, received their dividends regularly up to the 1st of January, 1891. After that they allowed their dividends to remain as a loan to the company; didn't draw it out.

Q. Was the price received for stock and bonds at the time the fair price, the value of those securities.

175 A. We considered it a very fair price.

Q. On what did you base your conclusions?

A. On the fact it was very difficult to sell any mining bonds. I had been trying for a year or two previous to negotiate the sale of the bonds without success until I met Elliott, Johnson & Co., who convinced me that the price was a fair price to get for them. We hoped to get more but we could not.

Q. Did all the directors agree about that?

A. Yes, sir; they agreed after some talk; they wanted more.

Q. You really were willing to take sixty cents for them?

A. We figured what we would get for the company would be 60 or 65 cents.

Q. What per cent. did you pay Elliott, Johnson & Co.?

A. They were to get all above 85 cents for the stock and bonds that they could make.

Q. Well, you paid them too in addition, you paid them a fixed commission, did you not?

A. No, we did not pay them any fixed commission; they would give us credit for the par value of the bonds and deducted their commission out, making 15 per cent.; they had to account for 35 cents for stock and bonds together.

Q. Was there any formal contract with them at all, any formal written drawn up agreement signed by both sides, with Elliott, Johnson & Co.?

A. I think there was.

Q. Where is it?

A. That is what I have been hunting for.

Q. You said there was not in your last deposition; you said it was only embodied in the correspondence?

A. I think that is right; they wrote a letter and we accepted it; there was no formal contract; I considered the correspondence the same as a contract.

Q. The letters you refer to are the letters identified by you this morning, are they?

176 A. Yes, sir; the one of April 1, 1889, from Elliott, Johnson & Co. to me and my reply to them as secretary, dated April 27, 1889, in which they stated their plans and proposition to undertake the sale of the bonds and my acceptance thereof on behalf of the board.

Q. They carried out their contract fully, did they, Mr. Carlisle?

A. They did.

Q. And very successfully?

A. Very successfully.

Q. They sold the bonds within a year, did they not?

A. Yes, sir.

Q. Did these letters in which this contract or formal agreement between the Great Western Mining and Manufacturing Company and Eliiott, Johnson & Co., was embodied vary the term- that you had orally come to, or modify them in any way, or were they simply the result of your oral negotiations with them?

A. They were substantially the same as we had orally agreed upon.

Q. I notice from these letters that you were in Wilmington, or in the East about April 14th, of 1899, the 16th, or along there?

A. I was, along in the month of April some time.

Q. And then you then came West?

A. Yes, sir.

Q. That the meeting was held in Ashland the latter part of April?

A. The regular annual meeting.

Q. And then you went back in May—at any rate after the meeting in Ashland?

A. Yes, sir.

Q. Did you see Mr. Scott or any one connected with Elliott, Johnson & Co., between the time you went East in the early part of April, 1899, and the time you went back after the meeting at Ashland?

A. I do not think I did.

Q. Were any of them out here during that time?

177 A. I have no recollection of any of them being out here during that time.

Q. I noticed in one of the letters referred to in this morning's examination you speak of B. D. Harris having arrived and you having shown him the letters, what letters did you refer to?

A. The letters of Elliott, Johnson & Co., in reference to the plan on which they would undertake to sell the bonds.

Q. He seemed to have made some suggestion about none of the bonds were to be sold unless all were sold?

A. His idea was none should be delivered until all were sold. In conversation with Mr. Scott, or correspondence with him, we found that would be impracticable.

Q. So the contract went through as originally proposed by them in their letter of April 18th?

A. Yes, sir.

Q. Mr. Carlisle, was the Great Western Mining and Manufacturing Company at any time after January 1, 1890, after paying its fixed charges and all its debts, in a position to pay dividends really?

A. We considered that the property, that the company, was perfectly solvent, and we figured on the net earnings of those years, and we thought a part of it ought to be divided among the stockholders and a part used to pay off indebtedness. We thought the assets were sufficient to pay off all liabilities; if the property had all been sold at what it was valued at, there would be sufficient to pay off everything and pay back the stockholders their money with a surplus on their investment.

Q. Was all the money used in paying dividends? As a matter of fact, however, the money that was actually used to pay these dividends you borrowed, did not you, or loaned the company yourself?

A. I advanced to the company, but the amount due to the company from other sources was sufficient to have paid it off; we could have collected it in, and expected to collect it in.

178 Q. Was not that which was due from other sources, which appeared as surplus earnings on the book, that is, the difference between the liabilities and surplus earnings, largely used all

the time you were paying these dividends in betterments of the property?

A. There was a great deal of it used that way.

Q. Did you pay the dividends with borrowed money, on the theory that the earnings having gone into betterments it would be equitable to the stockholders to give them their earnings—a share of them?

A. No, I did not figure in that way at all. At the end of the year we determined that the amount of the net earnings were, if all of the debts were paid, due to the company, and we made a dividend—what we considered a small dividend—at the end of the year. And I will say further, that we had the business in a very satisfactory condition, and it was able to take care of itself; and if it had been properly managed after it went into the hands of a receiver, there would have been no reason for sacrificing it.

Q. You had to borrow money in 1892 to pay the interest on the bonds?

A. I did borrow; yes.

Q. At the same time you were borrowing money you yourself were endorsing notes to get money to pay dividends to stockholders other than yourselves?

A. Not for that purpose; we were borrowing money all the time; in all business that is active you have to borrow money constantly; and, nevertheless, you have a profit, which is divided, even though you be carrying an indebtedness. The money was not borrowed for that purpose.

Q. Did not you actually borrow money in 1892 for the specific purpose of paying dividends with it?

A. No, sir.

Q. For the purpose of refreshing your recollections, I
179 refer you to page 50 and following of your prior deposition, and ask you to read it?

A. (After reading.) Well, I have read this, and I still make the same reply; I see nothing in this to change my answer from what I said previously.

Q. Did not you say, in answer to the question, "Was the company at any time after 1890 able to pay dividends after paying its fixed charges and all its debts? A. Properly speaking, I suppose not; but the profits having been expended in betterments and improvements, it was thought best to continue to pay dividends, as the money that was expended in these improvements came out of the earnings and properly belonged to the stockholders."

A. I said that in my previous deposition without, at that time, giving the matter much consideration. It is possible the same reasoning will hold good yet, but we did not borrow money to pay dividends with.

Q. Did not you say in your prior deposition, and is it not true, the questions and answers as follows: Q. "Was all the money used in paying dividends and interest on the bonds from

the time the bonds were given money borrowed for that purpose?" A. "Not all of it." Q. "From what time was that the case?" A. "With the exception of about $3,000 paid previous to January 1st, 1892, the balance of the money for that purpose was borrowed; that is to say, my account with the Great Western Mining Company; that they only owed me about $3,000 on the first of January, 1892; therefore, the dividends and interest previous to 1892 were paid out of the earnings, with the exception of that $3,000, or about $3,000." Q. "How about the items referred to in your account after January 1st, 1892, for dividends and interest?" A. "That was about all borrowed."

A. The misconception there is the fact that I kept the account as treasurer, and I paid the dividend and interest on the bonds, and besides a great many other items, and what I advanced I did
180 not consider that was borrowed for the company, because I expected to get that back at any time that I could.

Q. Leaving out the state of your account with the Great Western Mining and Manufacturing Company, at the time it failed how much money did it owe; do you know?

A. My impression is it owed between $50,000 and $60,000.

Q. That is, outside of the bonds?

A. That is, outside of the bonds.

Q. Did it not, in fact, owe over $100,000?

A. No, sir, I do not believe it did; anything like it.

Q. When had that indebtedness, whatever it was, been incurred?

A. The most of it had been incurred the last year of the operation of the company.

Q. You mean the year 1892?

A. 1892 and 1891. In fact I think that the indebtedness previous to January 1, 1892, had all been paid off, except what was due to me.

Q. What assistance did you have in managing this Great Western Mining and Manufacturing Company?

A. The vice-president, Mr. Richardson, was active in the management of Peach Orchard, and we had a general manager who looked after not only the operation of the company, but after the selling of the coal; that was the main assistance that I had.

Q. That was the practical operation of the company, was it not?

A. Yes, sir.

Q. But its financial management, the keeping it going and determining its policy, and all was practically left to you, was not it?

A. It was practically left to me; of course I corresponded with Mr. Harris, the president of the company, repeatedly, and got his advice about many things.

181 Q. You filed a claim against this Great Western Mining and Manufacturing Company, did not you, before the receiver?

A. Yes, sir.

Q. And it was disallowed?

A. Yes, sir.

Q. Can you make up now from the books, Journal 5, I think it is, and Ledger 5, together with the Great Western Mining and Manufacturing Company, books, an accurate statement of the account as it ought to be and was at the time of the failure of the Great Western Mining and Manufacturing Company?

A. I think I can.

Q. Will you do it?

A. Yes, sir.

Adjourned.

Office of Mr. John Carlisle.

THURSDAY P. M., *August* 11, 1898.

Continuation of examination of Mr. JOHN CARLISLE by Mr. CLEVELAND:

Q. Have you, Mr. Carlisle, now the letter book which contains your letters to B. D. Harris; any letter press copies and the original letters of B. D. Harris to yourself?

A. Yes, sir.

Q. Have you all the letters written by you to Mr. Harris, and by Mr. Harris to you, in connection with this Great Western Mining and Manufacturing Company?

A. No, sir; I have not.

Q. Which ones have you not?

A. I have not any letters that were written to Mr. Harris when I was away from Cincinnati; I made no copies of those.

Q. Have you all except those?

A. I think so.

182 Q. Written by you to Mr. Harris?

A. Copies of them, yes.

Q. Letter press copies?

A. Yes, sir.

Q. Have you all the letters written by Mr. Harris to you?

A. Well, that I can't answer positively; I think I have got most of them, if not all of them.

Q. Have you copies of such as you have which you wrote to Mr. Harris, and copies of the replies of Mr. Harris to you?

A. I have made copies of extracts of all those parts relating to the bond transaction of Elliott, Johnson & Co.

Q. Of those which you have in your possession?

A. Of those which I have in my possession.

Q. Have you got those extra copies with you?

Mr. TYLER: On behalf of the defendant I object to the introduction of testimony referring to the bond transaction prior to February or March, 1889.

A. I have copies here of the correspondence between Mr. Harris and myself relating to the bonds. And also copy of a letter written in February, 1888, which was one year previous to my becoming

acquainted with Elliott, Johnson & Co., or doing anything towards selling these bonds. (To Mr. Tyler.) You object, Mr. Tyler, to that going in?

Mr. TYLER: Yes, sir.

Q. From what have you those extracts?

A. I have made them from the letterpress copies of letters I have written to Mr. Harris and from Mr. Harris' letters to me.

Q. Will you attach them and make them a part of your deposition?

A. I do so, and hereby attach the same to make it a part of my deposition, and mark it Exhibit "98."

Mr. CLEVELAND: Now, Mr. Tyler, you object to that so far as it contains extracts of any letters prior to 1889?

183 Mr. TYLER: Yes, sir.

Mr. CLEVELAND: You do not object to the form of it, that is, using the copies instead of the originals.

Mr. TYLER: No, no; I have no objection to copies being used instead of the originals.

Q. I wish you would produce your letter book for 1888, Mr. Carlisle, and turn to page 487.

A. All right.

Q. Do you find a letter there?

A. Yes, sir.

Q. To whom is it addressed?

A. Hon. B. D. Harris, Brattleboro, Vermont, August 11, 1888.

Q. Will you please read that letter?

Objection.

A. No, I will not, because it relates to something entirely outside of the Great Western Mining Company.

Q. Won't you allow the court to judge of that?

A. I do not know how the court can judge of that, I know to what it relates.

Q. Is there any objection to reading it?

A. Mr. Cleveland, I do not like to have my private correspondence go into my testimony and be made public.

Q. We think, Mr. Carlisle, that it relates to this transaction, and we therefore request that that letter be read. If it does not relate to this transaction the court will not consider it.

Mr. TYLER: I object in behalf of Mr. Harris to anything prior to 1899; there was nothing thought of that issued bonds at that early date.

A. I shall decline to produce it; if the court orders me I will give him the original or make a copy of it.

Q. You decline then to read that letter, do you, addressed to Mr. Harris?

A. Yes, sir.

184 Mr. CLEVELAND: Counsel for the complainant states, he expects to show by that letter that as early as August, 1888, Mr. Carlisle wrote to Mr. Harris in connection with a proposed sale of this property to Mr. Vernon; and that in that letter there was contained certain allusions to the method of keeping the accounts of the Great Western Mining and Manufacturing Company, charging up certain matters, under the advice of Mr. Tyler, their attorney, to earnings, &c., as covering a multitude of sins, and to the division of the proceeds of the sale of bonds.

Mr. CARLISLE: I will state that the letter referred to had nothing to do with the selling of bonds of the mining company; it related entirely to the selling of bonds and stocks and the division of the proceeds thereof for the extension of the Chateroi railroad, called the Ohio, Kentucky and Virginia Railroad Company. At that time we were having negotiations with the Massachusetts and Southern Construction Company, which eventually were carried out, by which we undertook to do certain things and they undertook to do certain things. And the majority of our correspondence, in addition to that letter, related to the railroad business, which to us was the most important at that time, as we had a large amount invested in that road and we were then trying to dispose of the bonds of the Chateroi road which we held; and we expected to give up all of our stock at the same time that we disposed of the bonds of the railroad—our stock in that railroad.

Mr. CLEVELAND: Counsel for the complainant claims the letter refers to the sale of the mining company, and asks its production as before; and also notifies counsel for the defendant, B. D. Harris, that upon the trial of the case we will call for the production of the original letter from Mr. Carlisle to Mr. Harris, now supposed to be in the possession of Mr. Harris.

185 Q. Will you turn to page 499? State if you have there a letterpress copy of a letter written——

A. Yes, sir.

Q. What date is it?

A. August 16, 1888.

Q. Will you please read it?

Mr. TYLER: Note objection to all letters written before 1889.

Mr. CARLISLE: Well, now, Mr. Tyler, will I have to read this letter; this relates to the mining company; you have made an objection to it going in?

Mr. TYLER: That simply saves the right up there. As I understand it we have not any right to determine the question here. You can use your own discretion as to that. You can take just the same course you did before, if you like.

A. I would prefer to make copies myself of these letters, and I will make copies of both the letters, that of August the 11th, page 437 of my letter book, and that of August 16th, page 499, because

in reading them both over I find I was mistaken about the letter of August 11th referring to the railroad; it must have referred to the mining company.

Q. They both then refer to the mining company?

A. I think they do.

Q. Then why will not you read them?

A. I will read them if you request it but I would prefer to make copies of them, as I did of the others.

Q. I request that you read them.

A. I will read that of August 11. "Hon. B. D. Harris. Dear Sir: As I wrote you from New York, Mr. Vernon and I hurriedly prepared a new statement, which he had typewritten and forwarded to me to-day. Mr. Tyler and I went over the statement you sent together with Mr. Vernon, and made several alterations on the latter. I return herewith both to you for you to criticise, fix up and send to Mr. Vernon. You will have them typewritten for us. Mr. Tyler is of the opinion the words "necessary expenses and
186 outlays" will cover as he expresses it "a multitude of sins," and enable us to use the money received from sale of bonds, that is, what is left over and above paying the debts and working capital, &c."

August 16, is not Mr. Harris, that is to G. D. Harris; here it is.

Q. I know.

A. On August 16, I wrote to G. D. Harris, the brother of Mr. B. D. Harris.

Mr. TYLER: That is not part of this case, I object to that, it is not competent.

Mr. CLEVELAND: The court will determine that.

A. "Keene, N. H. Dear Sir: Mr. Vernon is trying to place $250,000 of bonds of our mining company for the purpose of retiring the $60,000 of 7% bonds that we now have, paying the floating debt of $50,000 which is due me, and enlarging our facilities for doing business by building more houses, a new store, a sawmill, and furnishing property in Cincinnati where we can elevate our own coal, for which I am now paying about $1,000 a month, and enable us to retail coal here without paying tribute, then give us some capital to buy our supplies for cash. In this latter item, in elevating coal, we can almost save sufficient to pay the interest on $250,000. After all this is done I think there will be left sufficient to divide that will almost refund to us what our stock cost us, $70,000."

Q. Is that all?

A. That is all.

Q. Now, will you turn to page 648 of your letter book. Do you find a letter there to B. D. Harris?

A. I do.

Q. What is its date?

A. February 7, 1889.

Q. Please read that.

A. "Hon. B. D. Harris, New York. Dear Sir: I have your favor of the 30th, enclosing mining company's note for $4,240, for which I am very much obliged. Our bookkeeper has had instruc-
187 tions to draw off my accounts from the company's books, and I am daily expecting it. I will bring it with me, when I come on and explain it to you. When Phelps took hold of the books he had to change the form to simple business bookkeeping; they had formerly been kept as railroad books, which form he did not understand; as a consequence there was some confusion which gave him much trouble, as well as his successor, the present bookkeeper. That is now all cleared up, except they have never had an account with capital stock. I will bring with me a complete trial balance and balance sheet, so you will be enabled to understand how the accounts are. I think your suggestion a very good one to have an expert to go through the books, and probably it may be necessary to rewrite them. Our present bookkeeper is very accurate and careful, and I am certain he can keep them properly if once started right. I expect to start to New York next Wednesday."

Q. Signed John Carlisle?

A. Yes, sir.

Q. All those letters were signed by you?

A. All those letters were signed by me.

Q. Did you have those books rewritten?

A. It was not necessary.

Q. Who is the Vernon referred to in the letters of August the 11th and 16th, 1888?

A. Mr. Vernon was an expert railroad accountant and had a large acquaintance with railroad men, and it was through him that we attempted to reorganize and carry out our plans for perfecting the Chateroi Railroad Company. Incidentally, during the negotiations with him, I had spoken to him about the necessity of our obtaining more money for the Great Western Mining and Manufacturing Company, in order to do a successful business, and he thought he could find parties that would loan us the money or buy our bonds; we were to put a bond on of $250,000. He prepared a statement, which was very well drawn up, but he never accomplished anything,
188 and, in fact, his health broke down, and after that summer he was not in a physical condition to do anything, and soon after that he died.

Q. How long did he occupy for his negotiations; when was it finally abandoned as to him?

A. Well, I had but little correspondence with him, but I saw him whenever I was in New York; I think it was abandoned in the fall of 1888.

Q. Could you refresh your recollection by your letter book to when you wrote him the last letter in reference to the matter?

A. I will see; I know Mr. Harris, the president of the company, strongly objected to have Mr. Vernon to do anything in relation to

the bonds, and he got the papers from him in the winter of 1888 and 1889, and at my request, in March, sent them to Elliott, Johnson & Co.; I find, upon examination of my letter book, a copy of a letter written to Mr. Vernon on the 9th day of January, 1889.

Q. After that you got the papers from him, did you?

A. After that I got all the papers from him.

Q. And turned them over to Elliott, Johnson & Co.?

A. Mr. Harris got the papers from him.

Q. And sent them to Elliott, Johnson & Co.?

A. Yes, sir.

Q. Did Mr. Harris, Mr. B. D. Harris, write any letter in reply to your letter of August 11, 1888?

A. I do not remember of any letter at that time.

Q. Can you look and see?

A. Well, the reason I do not think I did was, I went East right soon after.

Q. You have got the letters, have not you?

A. I do not believe I have any letters of 1888; all my letters were destroyed of all kinds up to 1890; but fortunately I saved all of Mr. Harris' letters from 1889.

Q. Can you answer whether or not you have got a reply to your letter of August the 11th, 1888?

189 A. I do not think I have.

Q. Can you tell definitely by looking?

A. Yes.

Q. Will you do so?

A. Yes, I can find no letter from Mr. Harris of that date in August, 1888.

Q. In reply to your letter of August the 11th?

A. In reply to my letter of August the 11th, and I am very certain I had no reply, because I went East to meet him in New York in August, 1888.

Q. Did you also look whether you had a reply from G. D. Harris?

A. Yes, I looked and there was none from him.

Q. Did you have any further correspondence, or other correspondence, with G. D. Harris in 1888 or 1889 with reference to this Great Western Mining and Manufacturing Company loan?

A. I had very little correspondence with Mr. G. D. Harris; my letters to B. D. Harris were meant for both always, and Mr. B. D. Harris, as I understood, sent my letters to his brother.

Q. Was that *vice versa*, too, G. D. Harris sent the letters you wrote to him to B. D.?

A. I think so, but I do not suppose there were four letters a year passed between G. D. Harris and myself, possibly not over an average of more than one a month.

Q. Will you look through your letter book and see if there are any other letters to G. D. Harris?

Objection.

A. I think most of the letters to G. D. Harris relate to the mining company, but as G. D. Harris is not a party I do not think I ought to read any letters to him; I think I will decline to hunt that up.

Q. I do not think you want to put yourself in that attitude?

A. I do not see what good it will do to have it in; of course, if the court orders me to do it I will do it.

Q. I have not asked what the letters are—I want to know if there are any?

190 A. I will look, but it will take time. You want to know the number I wrote?

Q. Yes, sir; I just asked you what ones you wrote—give me the dates and page?

A. I will go backwards; the last letter was written on the 20th of August, 1888, page 508.

Q. The last letter?

A. The last letter.

Mr. TYLER: The last you find in the index?

A. In the index, yes.

Q. That is, in that book?

Q. That is in this book. That letter has not one particle of reference to the mining company's business.

Q. I don't want it then.

A. Page 499 is the one I gave you.

Q. When was that letter book closed, Mr. Carlisle?

A. The first of April, 1889.

Q. Now, look at your letter book, the rest of 1889—I do not imagine there was much before that?

A. This letter book was begun in 1887.

Q. Run on back then?

A. (Indicating.) This was a letter written to him on the 26th of July, 1888, and stating I enclosed him a statement of the six months' business of the mining company.

Q. What page?

A. 475. The next letter was written on the 12th of July, 1888, simply acknowledging the receipt of coupons of the Great Western Mining and Manufacturing Co.—all that had reference to the mining company.

Q. What page is that?

A. 455.

Q. You seem to have written to him more than you thought you did?

A. Not more than once a month. This relates entirely to our railroad work, page 515 of my letter book, dated June 6th.

191 And I want to state that that year I had more correspondence with G. D. Harris than usually, for the reason that we then built this piece of road and we gave our joint notes to raise money to build it, and the notes had to be sent on to him for his signature or endorsement; and they came due about once a month and I had

always to write to get the note from him, to acknowledge the receipt of it.

Q. Why don't you let me run over that with you and see whether there is anything I want to ask you about?

A. I do not like to do it.

Q. It will save time.

A. This is page 370, a letter to him of April 16, 1888, enclosing a check for dividend. Here is one dated December 31, 1887, sending him a check to pay interest to the Cheshire bank, page 275. Shall I go any further back than that, that is December 31, 1887.

Q. When was that first increase of stock?

A. I think that was in 1887.

Q. Better run back just a little further and see.

A. This is a letter dated September 26, 1887, and refers entirely to railroad matters.

Q. What page is it?

A. Page 184—except the latter part of it, which simply says that I have paid for all the barges excepting four small ones, and the opening of the mines and improvements have all been paid for; that is all that refers to the mining company. Then one of August 11, 1887, page 144; the only part of that referring to the mining company is where I speak of the new tipple of the mines being ready. One of August 7, 1887, refers to the railroad, with the exception that I informed him that the new mines were ready for shipping coal.

Q. What page is that?

A. Page 137. And page 97 date of June 29, 1887, simply acknowledges receipt of the ten coupons of the mining company, enclosing a draft. Now, here is one dated June 23, 1887, page
192 92, in which I ask him to cut off and mail me the coupons of the mining company's bonds. And there I state, "I presume your brother shows to you my letters, and shall not write but a short one."

Q. The brother was living in Keene at that time?

A. Yes. You see our note of $15,000 was at the Cheshire Savings Institute at Keene, and I sent him on money always to pay the interest on that note. Page 61, written May the 23d, it simply acknowledges the receipt of a cancelled note he sent. And then I say I would go East the next day. On page 50, dated May 18, 1887, there is a letter simply on private business; it has no reference to the mining company's affairs.

Mr. TYLER: To all of this there is an objection, as being incompetent.

Q. Those are all the letters you find in your letter book?

A. Yes, sir.

Q. From April 1, 1887, to April 1, 1889?

A. Yes, sir.

Q. Those I understand you are unwilling to produce for inspection to see whether I want to offer them in evidence?

A. Yes, sir.

Q. Do you refuse to read them, or any of them, in evidence?

A. I have given you the substance already of each one I have looked at wherever it related to the business of mining company. In fact I may state they relate mainly to our railroad private business. As I stated before all letters relating to the mining company's affairs which I wrote to B. D. Harris I understood were submitted to his brother for inspection so I had no necessity for writing to him.

Q. Look at your letter beginning April the 1st, 1889, and see if you wrote G. D. Harris any letters in reference to this transaction with Elliott, Johnson & Co.?

A. When this meeting was called Mr. Black said it would
193 not take more than thirty minutes. I think I will decline to go any further in the G. D. Harris correspondence, as I do not see what it has to do with this case—unless the court orders me to do it.

Mr. CLEVELAND: Counsel for the complainant states that it appears from the bill herein, the charge in this case is against the defendant and the stockholders, that thus the sale of bonds and division of stock was in pursuance of a common plan to which all of the stockholders and directors were cognizant parties, and that in carrying it out, what was said to one of the parties, between the parties, is relevant and competent as against all of them. We therefore ask the witness to produce the correspondence with G. D. Harris covering the matters of the Great Western Mining and Manufacturing Company, and especially in connection with the sale of bonds of that company and so-called sale of stock and division of the proceeds.

Q. Mr. Carlisle, after this $75,000 was paid and realized from the sale of these bonds and received by the company, I understand it came into your possession as treasurer?

A. Yes, sir.

Q. How was the money distributed among the stockholders who paid it, in proportion to the amount of stock which they had transferred?

A. I did.

Mr. TYLER: Note my objection. The matter of the sale of stock being agreed to in writing, that written paper controls, instead of any opinion given by Mr. Carlisle at this time.

Q. You paid it out of that money, did you, that you received from Elliott, Johnson & Co.?

A. I paid for the stock out of the money I received from Elliott, Johnson & Co.

Q. In what manner did you pay it?—for example, how did you pay G. D. Harris?

A. Under the agreement made with the stockholders each
194 one furnished *pro rata* their proportion of stock, which was put in my hands, and whenever sold each was to receive the proceeds. As I received the money from Elliott, Johnson & Co. I would send checks to the different parties for their stock that was sold with the bonds.

Q. Did you pay them from time to time?

A. I paid them from time to time as I received it from time to time.

Q. Was all of the stock in your possession?

A. All the stock was sent to me when I requested it, the total of 1,500 shares.

Q. Had the certificates ever gone out of your possession?

A. Oh, yes, long previous to that.

Q. Were they all sent back at one and the same time?

A. No, they were all sent back at different times.

Q. Was there correspondence between you and B. D. Harris showing that?

A. I think some of it shows where I acknowledged the receipt of stock, where I wrote him to send me stock, I think that shows in that. But I would generally get the stock from B. D. Harris when I went East, and save registering the letter, you know. I thought it was the safest plan to get it when I went East; I was East nearly every month during 1889; I suppose I was in New York and Philadelphia probably one-half the time during that year, and Mr. Harris was there also.

Q. Then Elliott, Johnson & Co. had all the bonds, did they not, as soon as they were issued?

A. Yes, sir.

Q. Then when they sold the bonds they remitted to you the proceeds and asked you to send stock, or issue stock, in certain names?

A. Exactly.

Q. Which you immediatdly did and forwarded the stock?

A. Yes, sir.

Q. What I want to know is, at the time you issued those
195 certificates of stock to the purchasers of bonds did you have the stock of the two Harrises and the others who were contributing, or did you just issue stock and when they sent theirs in make the transfer?

A. No, I always made the transfer when I had the stock; my rule was not to issue stock until the old stock was surrended up to do it.

Q. Then you had the old stock ready to transfer as soon as Elliott, Johnson & Co. reported, did you not?

A. I did, in this way; If I did not have Mr. Harris's stock here with me I used my own stock until I received from Mr. Harris, and then returned that to myself; but I was always exceedingly careful

to keep the stock book to show the exact amount issued and no more.

Q. Then the 1,500 shares, that is the amount of them?

A. Yes.

Q. —that were turned over with the bonds to Elliott, Johnson & Co., or the purchaser of the bonds from Elliott, Johnson & Co., were not all put in your possession at one time?

A. No, sir.

Q. —to be issued as needed or required, or as the bonds were sold?

A. No, sir; they were put in my possession at different times.

Q. Have you any objection to allowing Mr. Tyler and myself to take the original letters which you have in your possession of B. D. Harris, all that you have, and also your letterpress books with your letterpress copies of letters to him, for the purpose of checking over the copies that you have made?

A. I do not see any necessity for that, Mr. Cleveland, because Mr. Tyler and I went over them together three or four times to get them right.

Q. You object to my verifying that?

A. Yes, sir.

Q. Why?

196 A. Because I have got too much private correspondence.

Q. Do you object to my going over them with you?

A. Yes, sir.

Q. Why so, just as to those letters?

A. Because you stated the other day that you were perfectly willing to have Mr. Tyler go over it and state whether I had copied what related to this matter, and I supposed that would be sufficient.

Q. There are two letters which I have found which I think very material, which according to your and Mr. Tyler's judgment were not covered.

A. I beg your pardon, Mr. Tyler had nothing to do with those letters and I did not either. You and I went over that book beforehand and put down those pages; when I read them over I said they had nothing to do with it. I think now I made a mistake in reading those letters, because one was to G. D. Harris, and one to B. D. Harris but I am willing to let them go in as long as I have done it.

Q. You won't produce, then, anything more than you have, which you say are copies of all that relate to this business?

A. Yes, sir.

Q. You state these copies contain all that are in any letters that are in your possession?

A. Relating to that matter; yes, sir.

Q. Relating to the Great Western Mining and Manufacturing Company's business?

A. No, sir, I won't say that, but relating to the bond matter, and that is all you have got to do with.

Q. Do they state all in relation to net earnings?

A. I do not think you have got anything to do with it. Take that letter, the very first one——

Q. You needn't to argue it, Mr. Carlisle. Do they state all that is related to construction account?

A. The letters have very little to state about the construction account; that is to be depended entirely upon the books.

197 Q. Do these copies which you have produced, which you say is all you will produce, made by yourself and gone over by Mr. Tyler——

A. Yes, sir.

Q. —contain all that any of the letters say or contain in connection with the Great Western Mining and Manufacturing Company's earning or construction account?

A. Yes, sir, they do; I thought you wanted me in the other question; I thought you wanted me to state whether I had an account with those items.

Q. Will you attach to your deposition the original letters received from G. D. Harris?

A. No, sir.

Q. Why not?

A. Simply because there is a great deal in those letteer has nothing to do with this, and is private business, and more that relates to the railroad and private business than to the mining business.

Q. Will you attach your letterpress copies to him?

A. No, sir.

Q. Why not?

A. For the same reason. At your request I have made copies and I am willing to have those attached.

Q. You said at the last hearing that is all you would do then, as you say now?

A. Yes, sir.

Q. You refuse, then, to allow me to go over the letters?

A. Yes, sir.

Q. Have you in your possession now all the letters you received from B. D. Harris?

A. I think I have got about all, probably not all, but most of them.

Q. Do you remember some time in the spring, when the matter of these letters first came up, you had at that time the B. D. Harris letters in your possession, did you not?

A. Yes, sir.

198 Q. What did you do with them?

A. As I said in my last deposition, I sent them on to him to look over.

Q. Why did you do that?

A. I wanted him to look them over and see whether there was anything in those letters of private business he did not want to have seen, and my reply from him was—well, I have got the reply right here; I wrote him to send them back.

Q. Please read that letter, Mr. Carlisle.

A. Letter from B. D. Harris of July 9, 1898: My dear Mr. Carlisle: I have your letter of the 6th, announcing that complainant in suit, Black, receiver, *vs.* B. D. Harris *et al.*, has requested you to produce my letters to you covering period of bond negotiations and asking my consent thereto. If this request is deemed legal and proper I have no objection to the production by you as proposed of any of my letters devoted exclusively to the subject matter of the complaint in this suit. Nor do I object to your copying and embodying in your testimony of such parts of any other letters that have a bearing on the suit; but I do decidedly object to the production and publication in the way proposed of my private and confidential letters or parts of letters that have no relation to matters involved in this suit. I think, however, that the letters contain very little that is competent to the case, my recollection being that nearly or quite all of whatever discussion that took place between us about the matters complained of in this suit was by word of mouth and very little if any by correspondence. But be that as it may, you have my full permission to produce any of the letters and parts of letters, as and to the extent hereinbefore stated, and I return them to you for that purpose as per your request. Yours truly (signed), B. D. Harris.

Q. Did Mr. Harris return you all that you sent?

A. All that I know of; I had not read them over before I sent them; I just rolled them up in a pile and sent them to him,
199 and the pile came back about the same size. As he states in this letter, most all of the business transacted between us in relation to the bond account was done personally; he was East or in New York all of the winter of 1888 and 9, and I was there frequently, and along in the spring, and I do not think there was a month between January and July that we did not meet personally, so that it required very little correspondence about this matter.

Q. If Mr. Harris is willing that these letters should be produced, so far as they relate to this matter, why are not you?

A. I am.

Q. You refused to produce them.

A. He says, "You can produce those letters, or parts of letters, but my private correspondence, letters or parts of letters, must not be produced," he does object decidedly to that.

Q. Did you send to him copies of your letters to him?

A. No, sir.

Q. And I suppose for the same reason you refused to produce the letters of G. D. Harris to you?

A. Yes, sir.

Q. Or even parts of those; you refuse to copy those, do you?

A. Yes, sir, I refuse to do it.

Q. Go on.

A. Because the letters which were written to him relate entirely to other matters, excepting probably one or two sentences might have been put in referring to this thing, in which his attention

might have been called to my letters written to his brother or the talks I had had with his brother. The main business transacted between my brother and myself and Mr. Harris and his brother was almost exclusively done by me on behalf of my brother and myself, and B. D. Harris on behalf of his brother and himself.

Q. Do you think that it is fair we should have an opportunity to judge of the relevancy of the evidence by seeing the letters, or seeing such parts of them as relate to this matter of the mining company?

200

A. I do not see why you have any more right to judge of the relevancy of that than we have, Mr. Cleveland.

Q. Anyhow you have shown all you intend or will do, or show?

A. Yes, sir.

Mr. CARLISLE (producing paper): Now, Mr. Cleveland, I desire to introduce this as an exhibit in connection with my testimony.

Mr. CLEVELAND: You better do that on cross-examination.

Mr. CARLISLE: No, I want to do it now. In my examination you have asked me a great many questions about this construction account and the figures, and asked me to go over the books and over every account, which I have done, and I have made a summary here of the construction account, which I would like to put in as one of the exhibits.

Mr. CLEVELAND: I do not know I have asked anything that calls for that, Mr. Carlisle.

Mr. TYLER: If Mr. Carlisle wants to make any exhibit or any supplementary statement in regard to what he has been called upon to testify he has a right to do it.

Mr. CARLISLE: In connection with that, to find out what the net earnings were, I have prepared a synopsis of it, which I would like to file as an exhibit.

Mr. CLEVELAND: I object to any voluntary exhibit or statement on the part of the witness.

Mr. BLACK: That might be proper subject for cross-examination.

Mr. TYLER (to the commissioner): Better state, the witness presents a certain statement which he presents as additional and supplementary statements to the matter called out in previous question.

Adjourned.

201

Office of John Carlisle.

TUESDAY AFTERNOON, *October* 4, 1898.

Cross-examination by Mr. TYLER:

Q. Mr. Carlisle, you were requested in direct-examination to go over the construction account for the year 1884 and set out the items in detail which ought to be included in that account for that year; afterwards that exhibit was not called for by Mr. Cleveland; did you prepare such report?

A. I did prepare such an exhibit and submitted it in my direct-examination and supposed that it was a part of my testimony at that time.

Q. Will you now make the same an exhibit and mark it?

A. I will, and mark it Exhibit No. 99. I want to state, Mr. Tyler, in connection with my answer to that, although this is a detailed estimate of the items that went into the construction account, yet properly that year all the expense account should have gone into the construction account, as all of the work was done for the purpose of getting the mines in a position to operate them, and what we received in sales that year was simply from coal gotten out from the entries driven and rooms turned, and we charged that up to expense, which was not right.

Q. Can you tell from an examination of Exhibit 99 how the total amount compares with the amount charged to construction account in the statement, Exhibit No. 2, in connection with which you were asked to furnish such exhibit?

A. Exhibit 99 shows that construction account should have been charged with $19,722.69; the Exhibit No. 2, typewritten copy for 1884, the item charged to construction account was $13,788.94, showing that there should have been charged $5,933.75 more to construction account than was shown on Exhibit No. 2.

202 Q. In your direct-examination, in speaking of construction account, you have stated that the amount of $21,000 for barges should have been charged in addition to what has already been charged to that account—that answer is found on page 89—please explain more fully in regard to that?

A. The ledger of the Great Western Mining and Manufacturing Company, in the item of construction, had never had charged to it the amount paid out for barges $21,000, or a little more, and it simply remained open on the ledger, that barge account, when it ought to have been closed and transferred to construction account, making that much more to construction.

Q. In the use of the word construction or construction account, in connection with the business of the Great Western Mining and Manufacturing Company please explain the full scope of the word and the full meaning of it as applied to that business?

A. Construction means all improvements and betterments to the property and all additions that will add to the value of the property.

Q. Then you do not confine the term to the actual building of new structures or new entries to mines, to rails for tracks, and so forth?

A. It will cover all costs of preparing the mines for operation, no matter whether it is rails, spikes, or what; everything that is necessary to prepare the mines to be operated safely; and also it includes all buildings and structures of every kind, like tipples, and all machinery, cars, barges—everything that is connected with the company that he helped.

Q. Then you include by that everything except the actual expense of getting out the coal and shipping the coal to market?

A. Yes, sir.

Mr. BLACK: Let me interrupt and ask the witness whether or not he is answering a hypothetical question or simply explaining the word construction as it was intended to cover expenses in the matter of the Great Western Mining and Manufacturing Company?

203 A. As connected with the Great Western Mining and Manufacturing Company.

Q. In a number of questions and answers in direct-examination the word arbitrary has been used with reference to estimates of amounts chargeable to construction account. I wish you would explain fully what was meant by the term arbitrary in your answer in that connection, as being arbitrary or not being arbitrary, sometimes it is "Not arbitrary."

A. According to my recollection the first question asked me on that point was in relation to the item, or the amounts rather, charged to construction account during the year 1884, amounting to something over $13,000, and I was asked if that was not arbitrary? I stated it was arbitrary in a measure. I should probably have said that it was arbitrary so far as expense account was concerned; for probably all the expenses of that year should have been charged to construction account, and I have not explained in my testimony all the other questions in regard to arbitrary that it was arbitrary only to a certain extent; what I meant was that it was arbitrary, the amount that we put to expense account was arbitrary; I recollect I stated the expense of management for one year was $8,000 and we charged $1,000 to construction account, when properly there should have been a great deal more charged to construction account.

Q. Have you prepared since the beginning of this examination an amended statement, showing the true condition of the account of the company in regard to construction?

A. I have and handed it to Mr. Cleveland, who still has it, I think, in his possession; but I have a copy some place that I could put in.

Q. I wish that you would furnish that statement and make it an exhibit to your deposition?

A. I will, and mark it Exhibit 100.

Q. Mr. Cleveland also called for a corrected statement of your individual account with the Great Western Mining and

204 Manufacturing Company, and then did not afterwards make the same an exhibit; did you prepare such an amended statement of account?

A. I did, and gave it to Mr. Cleveland, who said he would look over it, and denied having called for it.

Mr. BLACK: I never heard him say he never called for it; he said he had changed his mind about it.

Q. Please furnish that statement of account and make the same an exhibit to your deposition.

A. I will, and make it Exhibit 101.

Q. In the direct-examination and in the letters made exhibits there seems to be some reference to a man named Vernon, will you explain more fully who he was and what connection, if any, he ever had with the Great Western Mining and Manufacturing Company?

A. I think I explained pretty fully about Mr. Vernon in my direct-examination, that he was a gentleman who stood very high in railroad circles, and, as an accountant, a man with a large acquaintance with railroad men. My first acquaintance with him was in relation to the disposition of the Chateroi railroad, the railroad I had built to these mines, and incidentally the question of issuing bonds for additional capital for the mining company came up, and he said he would prepare a statement in order to bring it properly before the public. He thought he knew some people who would take hold of it. He did prepare such statement, which I sent to Mr. Harris, who did not approve of it, and in my letter to Mr. Harris in 1883, I referred to the statement which Mr. Vernon had prepared and which I had submitted to Mr. Tyler, who thought it might cover, as he stated it, "a multitude of sins." But Mr. Vernon never succeeded in enlisting any capital, or parties to furnish capital, to buy the bonds, and the matter with him was soon afterwards dropped, and then taken up with Elliott, Johnson & Co.

205 Q. Had he any connection with the bonds that were issued at any time?

A. No, sir; none at all. I do not think he knew anything about it.

Q. On page 113 of your direct-examination, in speaking of the conversation you had with Mr. Scott of Elliott, Johnson & Co., the following answer appears: I told Mr. Scott that was an impossibility, because our capital stock at that time was only $250,000, and it was agreed after some negotiation that we should give 50 per cent. of the stock, that is, give $150,000 of stock with the $300,000 of bonds; but I said to Mr. Scott at the time that the company could not of themselves give that stock, as they had no right; that we would have to get the stock from the shareholders; and I felt the shareholders were entitled to $100,000 more stock on account of improvements and betterments, and the value of the property had obtained by reason of that expenditure on it." Now do you mean to say in the latter part of that answer, when you said, "I felt that the stockholders were entitled to $100,000 more of stock," that you told this to Mr. Scott in this conversation?

A. I did.

Q. Then all that answer is intended to state what you told Mr. Scott?

A. Exactly.

Q. Did you furnish Elliott, Johnson & Co. a copy of the statement set forth in Exhibit No. 2, covering the receipts and expenditures

from 1883 to 1888, whatever is in Exhibit No. 2; did you furnish Elliott, Johnson & Co. a copy of the statement shown in Exhibit No. 2?

A. I am very sure I did, because I think one of my letters refers to my including such statement.

Q. Then they knew, did they not, the amount of the $60,000 bonded indebtedness existed, and also the floating indebtedness, as shown by that exhibit?

A. Yes, sir; they ought to have known.

206 Q. Prior to the issuing of bonds, and prior to the completion of negotiations with Elliott, Johnson & Co. to float the bonds, what measures did they take to satisfy themselves as to the condition and value of the property?

A. They employed Professor Wetherby, a well known geologist and mining engineer, to make a thorough examination and report, which he did, and it was printed and copies furnished to, I think, all of the purchasers of bonds by Elliott, Johnson & Co.; for of that I am not certain; there were a number sent to Elliott, Johnson & Co. for that purpose, in which Mr. Wetherby gave what he considered the value of the property, which was also endorsed by Mr. W. A. Goodman, of the National Lafayette bank, and two or three others, and also gave an estimate of the quantity of coal, and his statement of the quality of the coal and what would be necessary to do in the way of improvements to increase the output.

Q. Have you a copy of his report?

A. I have.

Q. What was his estimate of the improvements, the value of the improvements there?

A. I will have to look that up.

Mr. BLACK: That question is objectionable, if the report is competent it will show for itself.

A. Yes, on page 6 of his report is the cost of the improvements. Outside of the real estate, what they had, cost up to that time $163,100.

Q. What estimate did he place upon the coal? The value of the coal?

A. At ten cents a ton royalty he estimates the coal would be $650 an acre or $1,950,000 on 3,000 acres, or over $300 an acre for 6,000 acres.

Q. Please make that report an exhibit to your deposition.

Mr. BLACK: The report is objected to as incompetent.

A. I will, and make it Exhibit 102.

207 Q. Was any member of the firm of Elliott, Johnson & Company out to examine the property at any time?

A. Mr. Elliott, of the firm of Elliott, Johnson & Company, came out in the fall of 1889 after most of the bonds had been disposed of

and made a very careful examination of the property and the business.

Q. What did he say in reference to it?

A. He was very well satisfied.

Mr. BLACK: I object to the question and answer as incompetent.

Q. I think you stated that in 1883, when the Harrises bought out other stockholders and became interested in the company, that the amount of stock issued at that time was $200,000; when was there any additional amount of capital stock issued, first issued, any additional amount of capital stock?

A. It was in January, 1888. There was a meeting of the board in November, 1887, in order to call the stockholders' attention to the amount that had been expended in betterments—and the earnings—and recommended an increase of stock, to be divided among the stockholders. The stockholders met in January and authorized it, and following right afterwards the directors met and issued it.

Q. How much?

A. $50,000.

Q. How was it issued?

A. *Pro rata* among the stockholders of record at that time.

Q. According to their former holdings?

A. Yes, sir.

Q. What reference had this to the issue of bonds?

A. None whatever.

Q. When was the next issue?

A. In the spring of 1889.

Q. Before or after the issue of bonds?

208 A. It was before the issue of bonds but after the negotiations had been entered into with Messrs. Elliott, Johnson & Co.

Q. State whether the business of the Great Western Mining and Manufacturing Company from the time that the Harrises came into it up to the time that the receiver was appointed was profitable or unprofitable.

A. It was profitable.

Q. For what purpose was the indebtedness represented by the $60,000, of mortgage bonds and the floating indebtedness which existed in 1888, incurred?

A. It was incurred for the purpose of making improvements and an increase in the working capital.

Q. What became of the $60,000 of bonds and the floating indebtedness that existed at the time of the issue of the $300,000 of bonds?

A. The original bonds, the $60,000 were all redeemed by and in July, 1889, and the floating indebtedness was all paid off except a small portion that was due to me individually.

Q. Was any indebtedness existing in 1892 that existed before the issue of the bonds in 1889?

A. No, sir, there was not.

Q. In your direct-examination you have been questioned in

regard to borrowing money to pay dividends after the issue of these bonds in 1889, or whether it was the case or not, why was the company indebted after the issue of these bonds in 1889 when the indebtedness was all paid off, when, according to your statement, the company was making money all the time?

A. The amount borrowed, if any, was very small, but I don't think any money was ever borrowed to pay interest on the bonds, and the reason for that was this, that we couldn't realize from our sales in cash, we had to take notes and give time, and there was quite a large amount due to the company from that source, and I felt that we had a right to borrow temporarily the money
209 necessary to pay the interest, which I don't think occurred but once or twice.

Q. Well, were improvements being constantly made or not?

A. Why, certainly, constantly made all the time.

Q. What improvements had the company at Ashland, Kentucky?

A. They had built a tipple house there, a place to load the coal from the cars to the barges, and had machinery, boiler and engine for that purpose, and I think had expended quite a large amount, possibly $5,000 or $6,000, at Ashland for that purpose.

Q. You spoke about ice breaks in your direct-examination?

A. Yes, there were ice breaks built there to protect the barges from ice in the winter time.

Q. Can you testify what improvements and betterments were made after the issue of these bonds in 1889?

A. There were a number of additional houses constructed, mining machines purchased, new mines opened, a tipple built, and, I think, the new brick store was furnished after that; I don't think it was finished before.

Q. Was anything done at Ashland after that?

A. At Ashland there was but little done, because soon after that we had the rail connection with Cincinnati and shipped our coal all rail and gave up the river business.

Q. After the issue of bonds in 1889 who were the directors of the company?

A. The directors were the same as had been previous to that until April 1890, when H. P. Scott was elected a director in place of James G. Holden.

Q. Is that the Scott connected with the Elliott, Johnson & Co.?

A. He was of the firm of Elliott, Johnson & Co.

Q. He was a director from 1890 up to the time the receiver was appointed?

A. Yes.

210 Q. Was anything done by you, or by anybody else connected with the company, to depreciate the actual value of the plant and the property belonging to the Great Western Mining and Manufacturing Company?

A. No; on the contrary, everything was done to increase the value and to make it a very profitable operating concern.

Q. What was its condition in regard to profitable operation at the time of the appointment of the receiver?

A. I think it was very good.

Q. The property was worth as much then as at the time the bonds were issued, was it?

A. I think it was worth more.

Q. Was any criticism or objection made to the management of the company by Mr. Scott after he was a director?

A. I never heard of any.

Mr. BLACK: Did he ever qualify?

A. I do not know whether he did or not; I think he did.

Mr. BLACK: There is no evidence of it here.

A. No, but I know he agreed to serve as a director; I suggested to him that some one ought to represent the bondholder, as he said Mr. Elliott was away so much he couldn't do it; then I suggested Mr. Scott himself should be a member of the board, which he agreed to.

Q. Now, Mr. Carlisle, was there any arrangement or conspiracy between you and Mr. B. D. Harris in regard to the operation and management of this company by which any bondholders or other stockholders were to be injured or taken advantage of in any way?

A. No, sir; not at all; on the contrary, we were very anxious to have the property operated as profitably as possible, so that they would all be perfectly satisfied. Personally I will say, I took
211 an especial pride in it, and was extremely anxious to have the business very successful.

Q. I don't think there was; at that time I considered the company was in a very excellent condition; I had suggested putting it into the hands of a receiver from the fact that I was an endorser *and* considerable of the company's paper and knew that my assignment would precipitate an attack upon the company which would embarrass them very much, and to avoid that asked the company put into the hands of a receiver.

Q. What do you know, if anything, in regard to the operation of the business after the appointment of a receiver as to its being profitable or otherwise?

A. I know nothing of my own knowledge. I have seen a report made by the receiver, and also a report made by Elliott, Johnson & Co. to the bondholders a few months after the appointment of a receiver, which showed that the company was in a very prosperous condition.

Q. Making any profit?

A. According to the statement that I saw they were.

Meeting adjourned.

Office of John Carlisle.

TUESDAY AFTERNOON, *October* 25, 1898.

Redirect-examination by Mr. CLEVELAND:

Q. Mr. Carlisle, referring to the construction account as amended, being Exhibit 100, which you offered in evidence upon your cross-examination, will you kindly state what the item $5,933.75 which you added to what appears on the books of the Great Western Mining and Manufacturing Company as charged to construction
212 account in 1884 was composed of, and how it had been charged on the books of the Great Western Mining and Manufacturing Company and now appears on said books?

A. That will be shown by the Exhibit No. 99 made by me at the request of Mr. Cleveland in my direct-examination, when I was requested to show why the charge for construction account in 1884 was not arbitrary. It was the amount charged on the company's books was over $13,000 when it should have been over $19,000, as will be seen by the exhibit made by me.

Q. The items that composed that $5,000 and odd dollars had prior to that time, and still appear on the books, as charged to expense account?

A. Yes, sir.

Q. And you took them out of expense account and in this exhibit added them to construction account?

A. I did.

Q. Have you examined in detail the large account for $21,000 which you say should have been charged to construction account?

A. It so stands on the books of the Great Western Mining and Manufacturing Company.

Q. Have you examined otherwise than the ledger?

A. How do you mean, Mr. Cleveland?

Q. I mean have you examined the journal entries, and examined the vouchers, to see just what it was composed of?

A. I have not examined the vouchers, because I have not been able to put my hands on the vouchers—those things have never been submitted to me; but I have examined the journal entries, and find that is about right.

Q. About correct; in what respect is it not entirely correct?

A. Well, it is entirely correct, because it is the item taken from the ledger; the balance should be charged to that; that was the amount that was used for maintenance.

213 Q. You just simply took the ledger balance under the account headed Barges?

A. I did.

Q. And you did not examine the details of that ledger account as to how it was made up?

A. No, I did not examine that at this time, but I knew all about it before.

Q. Well, in 1889, when you reported to the directors and stockholders the earnings of the company that were going into construction, and prepared the Exhibit No. 2 to which you testified, why did you include that barge account?

A. I do not know but it was included in that.

Q. You think, then, that was included in the totals of Exhibit No. 2, do you?

A. I think it is—no, it is not included in that.

Mr. TYLER: It is additional, I understood you to say?

A. No, it is not included in that. There had been the habit yearly of transferring from the different accounts of the property chargeable to construction account, but the barge matter had been left off for some reason or other, why, I don't know.

Q. Was there any account kept in the books of the Great Western Mining and Manufacturing Company which represented the deterioration, the wear and tear?

A. The account of maintenance, all the different items would prove that. The amount expended for repairs; it would be properly chargeable to the maintenance of the different departments, the maintenance of the cars, of the machinery, and so forth.

Q. What I mean is, there is an account, when machinery is bought, when construction is made, called construction account, or machinery account, or buildings and machinery, or whatever else it may be called, meaning all the one and the same thing probably; that represents an asset of the company, or money invested by the company in the way of permanent improvements; is that correct?

214 A. That is correct.

Q. Now, from time to time I will ask you if it is not customary in manufacturing concerns and mining concerns which have plants to charge off a certain per cent. as representing deterioration in value?

A. It is customary to do so provided you do not offset that by charging for replacements, so as to keep up the assets in the same condition, good, condition they were.

Q. Is there any such account at all in the books of the Great Western Mining and Manufacturing Company, or was it all, or any offset of that sort, simply charged to maintenance expense?

A. It was simply charged; all the repairs and the keeping up of the property was charged to expense or maintenance and that kept the property in the original condition.

Q. Well, now, as I understand you heretofore in your testimony, this construction account was to a large extent made up in opening new mines?

A. Yes, sir.

Q. And making entries, and cleaning away the soil, so as to get at the coal, and other things of that sort; is that correct?

A. That is correct.

Q. When you exhausted a mine, or vein of coal, or place of working, all that work became useless, did it not?

A. It did.

Q. When that was done was the amount that it had cost charged off on the books of the Great Western Mining and Manufacturing Company?

A. No, sir; it was not, and it would not be customary to do it.

Q. Although it no longer represented an asset of the company, the amount had been spent upon it, upon the mines, the opening or entry?

A. I think that it would represent anything that had been expended, even though it had been lost, would represent an asset of the company at that time. But in making up your statement of
215 assets and liabilities you would not put it in that way; but any money expended in improvements, even though those improvements had been lost, was properly chargeable to assets.

Q. In making up a statement of assets and liabilities you would include among the assets then, the cost of that kind of work?

A. No, sir, I would not.

Q. If you did you would have to include among the liabilities the fact it had ceased to be valuable?

A. Yes, sir.

Q. In other words they would offset each other?

A. Yes, sir.

Q. Well, now, when these barges deteriorated with age or were lost or sunk, was any per cent. charged off?

A. There were never any barges lost at all after this transaction, this bond transaction, and there were additional barges purchased which were to take the place of those which had deteriorated, so as to keep the barge account at about $21,000. There was the maintenance and repairs of barges, which kept them up so there was no deterioration to speak of.

Q. The additional ones when bought were charged to barge account, were not they?

A. Not all of them.

Q. Do you know which were and which were not?

A. I know of one which was injured by ice; we got another barge in place of it from the party who had been the cause of the injury to the barge. We made them pay for it, whatever it was injured.

Q. It was the only instance you remember of?

A. There may have been one or two instances, I do not remember.

Q. What is the ordinary life of the barge?

A. Well, if properly taken care of a good barge ought to last from fifteen to twenty years; ours were properly taken care of.

216 Q. If a barge originally cost $1,000 or $2,000, or whatever it may have cost, would it not be proper to charge off each

year *of* fifteenth or one-twentieth of that original cost to profit and loss?

A. No, I do not think so.

Q. Was there any charge made for the deterioration of any of the structures connected with the mines?

A. No, sir, because they were always kept up in good condition.

Q. Even though they would cease to be useful, they were kept in good condition, were they?

A. I do not know of any of them that ceased to be used.

Q. What do you mean?

A. I do not know of any structures that we had ceased to use.

Q. Mines are structures?

A. No, I do not call those structures.

Q. What do you mean by structures?

A. I mean buildings and various things of that kind, the mines, of course, when they have mined all the material out are useless for mining, so far as that goes.

Q. All the tracks you have laid to them becomes useless?

A. No, sir, because you take them up and put them somewhere else.

Q. Would that be charged to construction account?

A. No, that would be charged to expense.

Q. Are you able to state how much of this construction account is composed of the cost of work which became from time to time by reason of the exhaustion of the mines valueless to the company?

A. I could not state it; I only know of one mine that became valueless; and that mine, there is plenty of good coal in it yet.

Q. Who was Professor Wetherby?

217 A. Professor Wetherby was a well-known geologist and mining engineer, who had formerly been professor of geology in the University of Cincinnati.

Q. Was he a resident of Cincinnati in 1888 and 1889?

A. No, sir; he was not; he was a resident then I do not know whether of Tennessee or western North Carolina, pretty near the border.

Q. How did Elliott, Johnson & Co. hear of Professor Wetherby?

A. I think when we were talking about who we were to have to make this examination I suggested Professor Wetherby. They knew of him, they had heard of him, and they at once assented and sent for him.

Q. How many times had Professor Wetherby been on the property before that time?

A. He never had.

Q. What connection did he have with the Great Western Mining and Manufacturing Company?

A. None whatever.

Q. Was he a personal friend of yours?

A. Yes, sir, he was a personal friend, if you can count it personal friendship when you do not meet a person but once in four or five years. I do not think I had met Professor Wetherby a dozen times in my life; but I knew of him and respected him very highly for his abilities, and I was proud to feel that he was a friend of mine, that is, I hoped he was.

Q. Was he sent down there to examine the property after this contract had been made with Elliott, Johnson & Co.?

A. Yes, sir; I think it was.

Q. That statement was gotten up then for the purpose of giving an idea to the purchasers of the bonds to the value of the property, was it?

A. I think so.

Q. And after Elliott, Johnson & Co. had agreed with you, or the company, to float the loan?

A. That is my impression.

218 Q. What did W. A. Goodman know about the property?

A. Mr. Goodman had been up there over the property, I think, twice; I know he was once, and he made a very close examination of it with some people, and he was very favorably impressed with it.

Q. Was he mining expert, or a coal mine?

A. No, sir.

Q. Was he president of a bank?

A. He was president of a bank.

Q. And of the bank with which the Great Western Mining and Manufacturing Company did its business largely?

A. No, sir; they did very little business with the Lafayette bank?

Q. Was it your bank?

A. It was where I kept my individual account; yes.

Q. Mr. Carlisle, what do you mean in your cross-examination by saying the Great Western Mining and Manufacturing Company's business between 1891 and 1892 was profitable?

A. I think the books will show that.

Q. Do you know the total amount of the debt of that company at the time it failed?

A. I think that the debts did not exceed $70,000; between $60,000 and $70,000 is what I have always said the indebtedness was.

Mr. TYLER: You mean, besides the bonded indebtedness?

A. I mean besides the bonded indebtedness.

Q. Well, assuming the debts were between $70,000 and $75,000 in 1892, when the receiver was appointed and the assets outside of the property covered by the mortgage was only $6,000, and that the dividend paid part of that, as you have already explained—was simply credits on the books of the company, never actually

219 paid in money, would you say that would indicate a profitable business between 1889 and 1892.

A. I would say it did not indicate a profitable business on the

basis of your assumption, but I do not believe there was any such condition of affairs.

Q. How much did you pay out in dividends between 1889 and 1892?

A. I will have to refer to the books to find that out.

Q. You get that, will you, and give it to the master?

A. Yes.

Q. Were the interest coupons of the bonds in default at the time of the appointment of the receiver?

A. No, sir.

Q. Had you borrowed money before that time to meet interest coupons falling due before that time?

A. The interest coupons that fell due on the first of June, 1892, I borrowed $5,000 towards the payment of those, part of which had been paid off previous to the company's being put in the hands of a receiver; I think there was remaining about $3,000 of that which had not been paid.

Q. Well, any indebtedness that existed in 1892 had been made, as I understand your testimony, since 1889, when the bonds were floated and all the floating indedtedness then existing was paid off; is that correct?

A. My impression is that all the indebtedness that was due at the time that the receiver was appointed had been largely incurred since the first of January, 1892.

Q. Well?

A. So that would answer your question; so it was after 1889.

Q. You say it had been mainly incurred since January, 1892; now if there was any before 1892 it had been incurred since 1889?

A. That is right.

Q. How had such an indebtedness, assuming it to be
220 $60,000, $70,000 or $75,000, been piled up between January 1st and the appointment of the receiver?

A. I could answer that by making a thorough examination of the books?

Q. Don't you know generally?

A. I do not.

Q. You said the business had been profitable; if you know that, I should think you could tell.

A. My report showed the business had been profitable. The last report, for 1891, that I made in the spring of 1892, showed that the profits were over $30,000, I think $33,000 for that year.

Q. Well, then you are going simply on the reports you made, and not on your present recollection?

A. On both.

Q. You still say the business was profitable in that period?

A. I think so.

Q. The company did not lose any money between 1889 and 1892?

A. The profit and loss was on the right side.

Q. That is, what you mean, it made more money than it lost?

A. Yes, sir.

Q. Do you say you never borrowed any money to pay dividends to those stockholders to whom dividends were actually paid?

A. No, sir; I never borrowed any money for that purpose.

Q. I will ask you in the case of Woodward, assignee, against the Great Western Mining and Manufacturing Company if you will testify money was borrowed for that purpose, and certain notes there offered in evidence represented the money that you had borrowed for that purpose, and had given the notes of the Great Western Mining and Manufacturing Company?

A. If such a statement was made it was under a misapprehension; it was meant there was some money borrowed to pay the in-
221 terest on the bonds on the first of June, 1894; but none was borrowed to pay dividends that I remember of.

Q. Why did not you pay dividends to all the stockholders then, if the business was profitable?

A. Because we were making the improvements and betterments and needed the money for that purpose; and thought that we could borrow from the stockholders, the main stockholders, better than we could from individuals or banks.

Q. Why was it you borrowed from one set of stockholders, being yourself and your brother and the Harrises?

A. And Elliott and Scott.

Q. And not from others?

A. Because the stockholders that we borrowed from represented the largest amount of stock, and the others were minor holders; we paid them their dividends in cash.

Q. They were the people that had bought these bonds, were they not?

A. Yes, sir.

Q. And none of the stockholders you borrowed from had bought any bonds?

A. Well, Mr. Scott and Mr. Elliott, we borrowed from them; I do not know whether they owned any bonds or not.

Q. They simply sold the bonds for you?

A. They probably held some; I do not know.

Q. I thought you employed them to sell the bonds?

A. We did, of course.

Q. Was that any reason why you paid those stockholders dividends and did not pay the others actual dividends?

A. The main reason we paid those we did pay cash dividends to was because they were small holders, and it required but little to pay them.

Q. Did you inform them, or did the company in any way inform them it had declared a dividend, but only paid a certain number of the stockholders a dividend?

222 A. No, sir.

Q. I do not understand you to testify Mr. Scott ever qualified as a director, do you?

A. I said I was not positive; but I think he did.

Q. Did he ever attend a meeting?

A. No, sir.

Q. If the company was operating profitably, as you testify in cross-examination, at the time of the appointment of the receiver, will you kindly state why your assignee had a receiver appointed?

A. Yes, sir. At the time of my failure, when I had to make an assignment, there was a great deal of the paper of the Great Western Mining and Manufacturing Company out of which I had endorsed individually, and fearing that the parties holding that paper would bring suit against the company and thinking that the wisest plan was to put it into the hands of a receiver so as to protect the company from such proceedings, it was done.

Q. You concurred, then, in that connection?

A. I suggested it.

Q. Did you read the bill?

A. I do not know that I did, I probably did, but I do not know at that time whether I would have known what I was reading or what I was doing.

Q. Do you know the allegations, what they set out in that bill?

A. No, I do not remember them.

Q. Was one of the reasons for the appointment of the receiver in connection with this paper that you have referred to the fact that there was paper of the Great Western Mining and Manufacturing Company outstanding which you had endorsed which was not for the benefit of the Great Western Mining and Manufacturing Company?

A. No, sir.

Q. There was such paper, was not there?

A. There was not.

Q. What was this *Volksblatt* paper?

A. They did not have any of the mining company's notes.

223 Q. Is that your recollection?

A. That is my recollection; they simply had the stock of the Great Western Mining and Manufacturing Company as collateral.

Q. Mr. Carlisle, this account of yours (Exhibit 101), as treasurer of the Great Western Mining and Manufacturing Company, and individually with the Great Western Mining and Manufacturing Company, is made up from your own books and the books of the Great Western Mining and Manufacturing Company, is it not?

A. Yes, sir.

Q. And you have to have your private books as well as the books of the company in order to get these figures, do you not?

A. Exactly.

Q. In other words, you can't take this account and get it off the Great Western Mining and Manufacturing Company's books?

A. Not the whole account, for the reason the entries made since the first of January, 1892, in my books had never been made on the

books of the mining company, and that, I think, were all of the items that were in my books that were not on the mining company's books.

Q. In the case of Woodward, assignee, against the Great Western Mining and Manufacturing Company, the bill in that case on which the receiver was appointed was based on an account of yours, was it not, of the alleged indebtedness of that company to you?

A. I do not know anything about that, Mr. Cleveland; as I stated before, I had nothing to do with the motions made in that case.

Q. You appeared and testified in that case as to an account of yours against the Great Western Mining and Manufacturing Company, I think?

—. ——.

Q. In reference to that account?

A. In reference to an account that I had against them.

224 Q. An account that amounted to some $21,000, did it not?

A. I think it amounted to more than that.

Q. How much did you claim that it amounted to?

A. I have forgotten how much it was.

Q. And that was entirely disallowed by the master, was it not?

A. Yes, sir.

Q. Now you have a different balance here, I see. What is the balance here you claim?

A. The total balance due me, both as treasurer and individually, is about $13,000.

Q. Is that the same or different from the balance claimed by you in that account in the other case?

A. It is different, because I did not deduct at that time the paper that I had charged the mining company with that had my endorsements on it, which had not been paid; that I have credited back on this account, which reduced the amount of indebtedness to me. But that account which I testified to was simply my individual account, and not my account as treasurer; now the two are together, and the net amount due me from the receiver is $13,000.

Q. That includes also a matter of compensation of yours?

A. Yes, sir.

Q. A commission of five cents a ton?

A. Yes, sir, in lieu of a salary.

Q. That was also claimed in that case?

A. I think it was.

Q. And disallowed, was it not?

A. I do not know whether it was or not.

Q. In order to go over this account of yours it will be necessary to have your book as well as the Great Western Mining and Manufacturing Company's books, and we wish you would produce those so we can examine them?

A. All right.

Q. Where can we have them and when?

A. You can get them any time you want them.

225 Mr. TYLER: Do you propose to take an item there (indicating on the exhibit) and then look it up in the book?

Mr. CLEVELAND: Oh, no; we propose to examine it in detail.

Meeting adjourned.

Office of Mr. John Carlisle.

FRIDAY AFTERNOON, *Oct.* 28, 1898.

Continuation of redirect-examination by Mr. CLEVELAND:

Q. Mr. Carlisle, refer to your statement of account which you put in your cross-examination?

A. You mean "individual"?

Q. And as treasurer; I want you to look at the ledger of the Great Western Mining and Manufacturing Company, marked Ledger B, referred to in Exhibit "A" of the testimony of Jordan Pugh, on pages 16, 17, 112, 113, 150, 152, 153 and 229, headed "Cincinnati coal yard account," and I ask you to state what that account represents?

Mr. TYLER: That is, the account in all these pages?

Q. Yes, sir; the same account.

A. That represents the shipments of coal to Cincinnati to my care to dispose of, and included that which came down by rail as well as that which came down by river.

Q. And that alone is all that it represents?

A. That is my impression, sir.

Q. How are the figures arrived at, and what do they indicate, by which the debits and credits are given?

A. The debits or charges were fixed at a certain amount for coal delivered here at Cincinnati, and in some cases for coal de-
226 livered on the cars at the mines; then in my reports of the sales I sent them a statement of the exact amount received, less the amount of freight and elevator charges and other little expenses which might be incurred in selling the coal, such as measuring barges and the like of that.

Q. In the first instance, then, the amounts were charged to you at an arbitrary amount, were they, in this account headed Cincinnati coal yard?

A. They were charged at a fixed rate, not arbitrarily, and were not charged to me individually, but to the Cincinnati coal yard.

Q. And the amount you actually received from them was reported by you how often?

A. Every month.

Q. And then that was credited to this Cincinnati coal account?

A. Yes, sir.

Q. And any difference between the original amount charged to you and the amount of these credits furnished by you, what was done with that?

A. That went to earnings.

Q. It was credited to earnings?

A. Yes, sir.

Q. But if it sold for less than the original charge to you how was the account balanced?

A. It never sold for less.

Q. How often was that done—the account balanced?

A. I think every six months.

Q. The account beginning on page 229 represents the coal that was shipped to you from and after the first of January, 1892, up to the appointment of the receiver, does it?

A. That is what it appears to be on the ledger.

Q. Now when you received this coal in Cincinnati to what account did it go in your books, the proceeds that you received from it?

A. To the credits of the Great Western Mining Company.

Q. Did you credit the amount actually received or the
227 amount at which it had been charged on the books of the Great Western Mining and Manufacturing Company to the Cincinnati coal yard?

A. I think the amount actually received in most cases.

Q. Now I show an account beginning on page 14, called John Carlisle?

A. Yes.

Q. Continuing on pages 15, 134, 135, 206 and 207, and ask you what that account represents?

A. The individual account of John Carlisle on the books of the Great Western Mining Company.

Q. What items went into that account?

A. Every item that occurred either in the receipts for coal sold, on the credit side, and the amounts paid out by me for the benefit of the company on different accounts, and everything that pertained to the business of the Great Western Mining Company that I had anything to do with, excepting the payments of dividends and interest on bonds.

Q. You were charged, as I understand you, a certain amount when coal was shipped; that is, it was charged to the Cincinnati coal yard?

A. Yes, sir.

Q. And you reported what you received for it?

A. Yes, sir.

Q. Now the difference between what it had originally been charged to you and what you received, was that balanced and charged over to you on this John Carlisle account?

A. No; the amount that I received the total amount, that I received, was charged to me on the John Carlisle account and credited to the Cincinnati coal yard on the books of the mining company.

Q. And then sums that you had paid out for the benefit of the company here in Cincinnati, how were they charged on the books of the mining company?

A. They were reported to the bookkeeper and they were
228 credited to my account.

Q. The John Carlisle account?

A. The John Carlisle account, and charged to the different accounts that they were owing to.

Q. That they were on account of?

A. That they were on account of.

Q. Now I show you an account on page 366 called John Carlisle, treasurer of the Great Western Mining and Manufacturing Company, and ask you what items went into that account?

A. The interest on bonds and dividends mainly.

Q. Paid by you?

A. Paid by me.

Q. And on the other side?

A. The other side was for the amount transferred to working capital.

Q. From what account?

A. From the treasurer's account.

Q. There was a distinction, then, between the account John Carlisle, treasurer, and treasurer's account, was there?

A. There was on the mining company's books.

Q. What did treasurer's account represent? That you will find on page 396.

A. That represented the amounts received for the sale of the bonds and the amounts paid out on account of them.

Q. And represented nothing else did it?

A. And represented nothing else.

Q. Are those accounts mentioned—Cincinnati coal yard account, John Carlisle account and John Carlisle, treasurer account—the only accounts on the books of the Great Western Mining and Manufacturing Company which enters at all into the matter of how much was due you as claimed by you at the time of the failure of the company?

A. I think so.

Q. Have you your own books here?

A. I have.

229 Q. Will you produce them?

A. Yes, sir; I here produce them.

Q. I show you a book marked Ledger No. 5, John Carlisle, and ask you to state what it is?

A. It is my individual ledger of my account.

Mr. TYLER: Covering what time?

A. Beginning the first 1888, up to the present time.

Q. It represents your business transactions during that period, does it?

A. Yes, sir.

Q. And among others the business handled by you on account of the Great Western Mining and Manufacturing Company?

A. Yes, sir.

Q. I believe you have already stated in your evidence that the Cincinnati end of that business, of that company, was practically run by you?

A. Yes, sir.

Q. How did you carry it on your own books, in what accounts?

A. In the account of the Great Western Mining and Manufacturing Company, and John Carlisle, treasurer:

Mr. TYLER: You mean by that two accounts?

A. Yes, sir.

Q. Are these books of original entry?

A. Yes, sir.

Q. Have you the journal corresponding to this Ledger No. 5?

A. I have, and produce it, marked Journal No. 5, John Carlisle.

Q. And they practically represent the transactions between you and the company, do they?

A. Yes, sir.

Q. I show you an account beginning on page 78 of Ledger No. 5, John Carlisle, headed Great Western Mining and Manufact-
230 uring Company, and continuing on pages 79, 80, 81, 82, 83, 84 and 298, and ask you what account that is?

A. That is the account of the Great Western Mining and Manufacturing Company.

Q. And the items of debit and credit represent what kind of transactions?

A. The items of debit represent all the payments made by me on account of the mining company, and also paper endorsed by me, and which I charged to the mining company; and the credit side represents all receipts received by me for the benefit of the mining company.

Q. Does the account beginning about the middle of page 84 and continuing on page 298 represent the transactions after January 1, 1892?

A. They do.

Q. What account in the books of the Great Western Mining and Manufacturing Company corresponds to this account in your books called the account of the Great Western Mining and Manufacturing Company?

A. It corresponds to the account headed John Carlisle in the books of the Great Western Mining Company.

Q. Referring to that account, John Carlisle, in the books of the Great Western Mining and Manufacturing Company, in Ledger B, heretofore identified, on page 206, I will ask you what balance the books of the Great Western Mining and Manufacturing Company, show to the credit of John Carlisle upon the first of January, 1892?

A. It shows a balance of $2,752.30.

Mr. TYLER: That is, the mining company's books show that?

A. The mining company's books show that.

Q. That they owe you that much, I ask you, referring to the account of the Great Western Mining and Manufacturing Company in

your book, Ledger No. 5, John Carlisle, on page 84, what bal-
231 ance does that book show to be due you upon that date, the first of January 1892?

A. The balance due me by the mining company on that date was $2,752.30, and that agrees with the books of the mining company.

Q. I show you an account in your book, Ledger No. 5, John Carlisle, page 134, called coal account, continuing on pages 135, 136, 137 and 184, and ask you what account that is?

A. That is called coal account and is for coal purchased by me to fill contracts made by the Great Western Mining Company; and the credit side shows the amounts received from the sales of that.

Q. That is, coal purchased by you from other parties?

A. From other parties; yes.

Q. I show you an account in your book, Ledger No. 5, John Carlisle, beginning on page 208, headed Great Western Mining and Manufacturing Company, John Carlisle, treasurer, and continuing on page 293, and ask you what account that represents?

A. That represents the amount paid out for dividends and interest on bonds and charged to the John Carlisle, treasurer, account of the Great Western Mining Company.

Q. And what on the other side?

A. On the credit side is the amount received from the mining company on account of these payments.

Q. What account in the books of the Great Western Mining and Manufacturing Company corresponds to this account in your books?

A. John Carlisle, treasurer, should correspond.

Q. What account in the books of the Great Western Mining and Manufacturing Company corresponds to the account heretofore identified by you in your books as coal account?

A. None.

Q. What account in your books corresponds to the account in the books of the Great Western Mining and Manufacturing
232 Company, heretofore identified by you as the Cincinnati coal yard account?

A. None.

Q. As to those two accounts, the coal yard account—the Cincinnati coal yard account, in the mining company's books and the coal account in your books, balances were charged or credited, as the case might be, were they, to the one or the other accounts?

A. In my books the coal account was never fully balanced, but nearly the amount of profits that was made on that was credited to the mining company account.

Q. And in the books of the Great Western Mining and Manufacturing Company the balances of the Cincinnati coal yard account were, as you have already stated, charged over to your account?

A. Yes.

Q. John Carlisle in those books?

A. I should like to state in regard to that coal account I do not

think the mining company was entitled to the credit of the profits made on that, because they did not take any risks; I took all the risks and did all the buying, but nevertheless I gave them the entire amount of profit.

Mr. TYLER: Have you any idea of what the profits were?

A. Oh, it amounts to several thousand dollars.

Q. Will you, Mr. Carlisle, prepare or have prepared, a transcript of the account called the Great Western Mining and Manufacturing account, as shown on your book, Ledger No. 5, John Carlisle, from the first day of January, 1892? Also of the coal account from the first of January, 1892; also of John Carlisle, treasurer, account from the first of January, 1892, to the close of the accounts at the time of the assignment, from your own books?

A. Yes, sir, I will.

233 Q. Do these three accounts to which I have called your attention on your books, namely, the Great Western Mining and Manufacturing Company account, coal account, and John Carlisle, treasurer, Great Western Mining and Manufacturing Company account, represent all the accounts on your books which have to be considered in determining the amount due you at the time of the failure of the Great Western Mining and Manufacturing Company and the appointment of the receiver?

A. Yes, sir, they do.

Q. There are no other accounts, are there, on your books that enter into that question?

A. There is the account with the C. H. & D. Railroad Company, but I do not think that enters into the question at all; still if you want that I can have that drawn off. The balance there against the Cincinnati, Hamilton and Dayton Railroad Company which has been charged has already been credited to the mining company either in the mining company account or coal account in my books.

Meeting adjourned.

Office of John Carlisle.

TUESDAY, 2.30 P. M., *March* 13, 1900.

Present: Mr. Cleveland, Mr. Black, Mr. Tyler, Mr. John Carlisle and the commissioner.

Continuation of examination of Mr. JOHN CARLISLE by Mr. CLEVELAND:

Q. Mr. Carlisle, I want you to look at a plat which I produce, and ask you to state if you recognize it, and what it is?

A. (Examining plat.) Yes, sir, I recognize it; it is a plat of the Old mine at Peach Orchard.

234 Q. The Old mine is the mine about which you have already testified, in which the entry was cleaned out?

A. Yes, sir.

Q. And driven further than it ever had been before?
A. Yes, sir.
Q. And side entries also driven?
A. Yes, sir.
Q. And coal taken out prior to 1887?
A. Yes, sir.
Q. And this plat which was kept by the engineer, was it, showing the entries driven, the side entries and the chambers which were mined?
A. The rooms.
Q. The rooms which were mined?
A. Yes, sir.
Q. (Indicating.) What do these different colors, Mr. Carlisle, mean upon this plat, and those similar which are traced in pencil?
A. The different colors mean the different years that the coal was mined out of those places. This that is in green was mined in a certain year; that which is in red was mined in another year, and the red penciled one what was mined afterwards, but had never been colored.
Q. When was it you last stopped mining in the Old mine?
A. I couldn't answer that question without looking; probably the records or the letters show, I do not remember just when; I think it was about 1887.

Mr. CLEVELAND: Now, Mr. Tyler, are you willing a tracing of this plat shall be put in, in place of this big heavy plat? We will have the tracing show the same colors just as this does.
Mr. TYLER: Yes.

Q. Was all the coal exhausted in the hill in which the Old mine was?
A. No, sir; not by a great deal.
Q. But this is all that had ever been mined?
235 A. I think, that is all that ever has been mined there.
Q. To this time?
A. I do not know up to this time.
Q. Up to 1888?
A. Up to 1888.

Mr. CLEVELAND: This plat is offered in evidence, marked "Plat of Old Mine" and by consent of parties a tracing will be substituted in place of the original, and attached as Exhibit 102 A.

Q. I show you another plat, Mr. Carlisle, marked "Map of North and South Mine," do you recognize that?
A. (Examining it.) I do.
Q. What does that indicate?
A. That indicates the two mines that were opened on the north and south side of Miller's branch.
Q. Do you remember what year they were opened?

A. I think, about 1884 and 1885.

Q. What do the different colors upon this plat indicate?

A. The red color indicates the amount of coal worked out during the year ending January 1, 1884, and the green is to the 1st of January, 1885, and the pink stripes is for the year 1885; that is, to the 1st of January, 1886, if I am not mistaken, and the blue would be the following year, 1887, but I do not think there was much done in 1887, very little.

Q. Do you remember what mine was being used in 1888?

A. I think the Annie and Elizabeth.

Q. Were opened that year?

A. I think that year.

Q. Were mined that year?

A. Were mined that year; they have been mining ever since there.

Mr. CLEVELAND: This tracing of map of North and South mines is also offered in evidence; and by consent of parties a tracing colored in the same way, is substituted in lieu of the original, and attached hereto, marked Exhibit 103.

236

Q. In this North and South mine, Mr. Carlisle, was the coal all mined out?

A. Not by a good deal; no, sir.

Q. Has it been mined since?

A. Not to my knowledge. The South mine was abandoned by reason of water. The dip of the coal was to the south, and consequently the entries and rooms got filled with water and couldn't be worked. But it was intended that the Annie mine, which was south of this on another branch, which is called the road fork of Nat's creek, was exposed to connect with the South mine, as shown on this plat, and when that connection was made it would then have drained the water out so the coal could have been mined out that hill; there was an immense quantity left there. The North mine, we found the coal had been getting too thin to mine to prosperous advantage, that is the reason that was abandoned.

Q. That has never been mined since?

A. No.

Q. Why was not the Old mine continued?

A. On account of the immense amount of what the miners call gob.

Q. What does that mean?

A. That is parting between the coals. This Peach Orchard vein had a large parting running six inches, probably up to sixteen inches, when the parting got so heavy it made it too expensive to mine the coal; we had to haul it out and throw it away.

Q. Do you know when the last mining was done in the Old mine?

A. Well, I think about the time it was done in these mines (indicating the North and South mines). For a while we used one tipple

for all three mines, then we abandoned this and used the tipple for the North and South mine.

237 Q. You mean by abandoning this, abandoned the Old mine?

A. Yes, sir.

Q. And moved the tipple to the other mine, the same tipple?

A. Yes, sir, moved the tipple to the North and South mine.

Q. You do not remember the year, I suppose, in which Annie and Elizabeth mines were opened?

A. No, I couldn't state positive, unless I refer to some old papers.

Q. I show you a tracing of the Annie and Elizabeth mines and ask you if — recognize that as a plat of those mines?

A. I don't recognize them, but it is very similar, if I could see the original map I could very soon identify it.

Q. Was not the Annie and Elizabeth mine opened about the year 1886 and 1887.

A. I think about 1887 or 1888.

Q. Just when you stopped using the North and South?

A. Using the North and South mine, yes.

Q. Which was opened because it would be more profitable to use coal in that mine?

A. Yes, for two reasons, one was as I stated before, the Annie mine was opened expecting to drive the entry far enough in to reach the South mine, that had been allowed to fill, in which event the water would have been drained out of the South mine and they could have got out an immense body of coal that remains there. The Elizabeth mine, the coal was found to be better, heavier, and most of the work was done in the Elizabeth mine. But the reason we opened the two mines was, so as to have one tipple do the work for two mines instead of one mine.

Mr. CLEVELAND: Mr. Tyler, this is in daily use, and they took off a tracing.

Mr. TYLER: If it is a tracing of the original it is all right.

238 Q. The Annie and Elizabeth mines are the mines they have been using ever since, Mr. Carlisle?

A. Yes, sir.

Q. Up to the present time?

A. That is, I suppose so, I have not been up there for several years?

Q. As far as you know?

A. Yes, sir.

Q. They were the mines used for the time your connection with the company continued?

A. Yes, sir.

Mr. CLEVELAND: I offer this tracing. (Marked Exhibit 104.)

Adjourned to 11 a. m., Saturday, March 17, 1900.

Office of Mr. John Carlisle.

SATURDAY, *March* 17—11 a. m.

Present: Mr. Cleveland, Mr. Tyler, Mr. Carlisle, Mr. Keys and the commissioner.

Examination of Mr. CARLISLE continued by Mr. CLEVELAND:

Q. I show you the map purporting to be the map of the Annie and Elizabeth mines, Peach Orchard, Kentucky, referred to by you in your last examination, and ask you if you recognize this as the original map of the company?

A. (Examining it.) I do.

Q. I now show you the tracing that was referred to at the last examination, and ask you if you recognize that tracing as a tracing of the workings of those two mines prior to 1889?

A. By comparing the tracing with the original map I am satisfied the tracing is a correct copy of the workings done previous to 1889 in those two mines.

239 Q. The mines were opened in 1887, were they not, Mr. Carlisle?

A. Yes, sir.

Mr. CLEVELAND: The tracing above referred to having been identified, it is agreed that it may be offered in evidence and made a part hereof, and of the same effect as the original map, and I again offer it (marked Exhibit 104).

Witness withdrawn.

And also HAVEN H. KEYS, of lawful age, being first fully cautioned and sworn, deposeth and saith as follows:

Direct examination by Mr. CLEVELAND:

Q. Where do you reside?

A. At Ashland, Kentucky.

Q. Have you any connection with the Great Western Mining and Manufacturing Company?

A. I understand that that company has gone out of existence.

Q. Have you any connection with the Peach Orchard Coal Company, the successor of that company?

A. I have.

Q. What is your connection?

A. General manager.

Q. That is a company operating the mines formerly owned by the Great Western Mining and Manufacturing Company, is it?

A. Yes, sir.

Q. When did your connection with that company begin?

A. With the Peach Orchard Coal Company?
Q. Yes.
A. On its organization?
Q. Do you remember when that was?
A. I do not.
Q. Were you ever connected with the Great Western?
240 A. Yes, sir.
Q. When did your connection begin with that?
A. In September, 1891.
Q. In what capacity?
A. Bookkeeper; mine bookkeeper.
Q. Are you also a surveyor or mining engineer?
A. I do our own work.
Q. When did you first become familiar with the property, its condition and so forth?
A. I handled the mine business from the start; I knew about the working condition of the property from the beginning.
Q. That is, from the beginning of your connection with the Great Western?
A. Very soon afterwards, as soon as I could acquire the knowledge.
Q. What mines have been used there, either by the Great Western or Peach Orchard Coal Company since 1891?
A. The Annie and Elizabeth.
Q. What was the condition of the Old mine at the time you became acquainted with the company?
A. They were abandoned.
Q. Have they ever been used during that period?
A. No, sir.
Q. What was its physical condition?
A. The entries were entirely closed.
Q. What do you mean by that?
A. The openings of the tipple—the outside openings.
Q. How closed?
A. Fallen in.
Q. Is there any territory that was opened up by the Old mine which is still valuable for mining purposes?
A. I am given to understand there is not.
Q. Why not?

Objected to by counsel for defendant, the previous answer as hearsay.

241 A. There is a fault in the hill; a fault midway in the hill buts the coal entirely out.
Q. What personal knowledge have you as to that matter?
A. Nothing, only as to the plats I have seen and what I have heard as to its operation.

Answer objected to by counsel for defendant as hearsay.

Q. Are you familiar with the mines known as the North and South mine?

A. As to the North mine I should answer the same as for the Old mine; the South mine I have been through; that is, those portions of the entrances that are still standing.

Q. What about the North mine do you personally know?

A. I can see from surface indications what is caved in; there are great fissures in the rock that extend to the top of the mountain.

Q. What is the effect of the caving in of a mine as to its availability for mining purposes, even though there may be coal there?

Objection by counsel for defendants that counsel has not qualified the witness.

A. It would involve a great expenditure to get around it and in again.

Q. Do you know anything about the character of the coal that was in the hill, or the extent to which it had been mined while it was used?

A. Well, the coal was the best, I understand, that was ever mined at the Peach Orchard. The coal that remains in that boundary, owing to the peculiar condition of the strata, is not profitable to work; the muck is too large.

Q. What do you mean by that?

A. The strata lies in a wedge shape, and coming toward the small part of the wedge of the strata the coal was all right, but
242 when it struck that it widened out to such a height the coal could not be worked profitably.

Q. Is that Mr. Carlisle has referred to heretofore as gob, what you call muck?

A. It makes gob; it is muck as it lies in the strata, and gob after it is taken and thrown back.

Q. Now, how about the South mine, what was its condition at the time you became acquainted with these mines?

A. The entrances were all fallen in with the exception of three, I think, that led out as rather prospect entries.

Q. What are prospect entries?

A. Entries driven ahead in a body of coal to determine whether or not it would be profitable to be worked.

Q. Was the South mine being mined?

A. No, sir.

Q. Could it have been mined at a profit at that time, or at any time you have been connected with the company?

A. No, sir.

Q. What is the reason of that?

A. The coal is too low.

Mr. TYLER: That is, the price of coal is too low?

A. No, sir, the height.

Q. What do you mean by "the coal is too low"?

A. Well, we have only about 3′ 10″ to 4′ 2″ in height in the first

place. Miners can't work in that height of vein, especially when they have got the strata of impurities we have got in the Peach Orchard mine to contend with.

Q. You mean by 3.10 and 4.2, three feet ten inches?

A. Yes, sir; three feet ten inches, four feet two inches.

Q. The South mine, whatever coal is left there could not be mined to that height on account of that thinness of seam?

A. No, sir.

243 Q. Does either the Annie or Elizabeth mine connect with the South mine?

A. The Annie mine does.

Q. What effect has that on the use of the entries which may have been driven in the South mine prior to its abandonment?

A. None, whatever; only the use of those entries at an unprofitable basis if we care to attempt it.

Q. I suppose you have no personal knowledge, Mr. Keys, why it was the Old mine, and the North and South mine, were ceased to be used prior to 1889?

A. No, sir.

Q. You were not there at that time?

A. No, sir.

Q. Could you, as a miner, and one familiar with those mines and their operation, give an opinion as to why it was they should have ceased and the Annie and Elizabeth should have been opened?

Question objected to by counsel for defendant that the witness had not qualified as an expert.

A. My evidence would be all hearsay on that.

Q. Could you give an opinion?

A. I should say if a mine were thrown in it could not be worked.

Q. You said you were general manager of your company and mining engineer; I wish you would explain fully just what your duties are up there, and what familiarity you have with the conditions and the mining business?

A. Well, I have general charge of the work, and I do such engineering as is required in the working of the mine.

Q. What does that involve?

A. As to management or engineering?

Q. Engineering.

A. The laying off of entries so as to develop a certain body of coal in the proper kind of manner, tap it in the right shape for working.

244 Mr. TYLER: This line of questioning as to the present state of affairs, or anything which has occurred since 1892, I object to as irrelevant.

Q. Does that involve the determination of what mine is profitable, what mine seems to be profitable to work?

A. It does.

Q. And what training have you had in that connection?
A. My experience in Peach Orchard.
Q. The last nine years?
A. Yes, sir.
Q. You say you are a bookkeeper, Mr. Keys?
A. I am.
Q. How long have you been a bookkeeper?
A. Nine years.
Q. I will ask you if in the construction or opening up of a mine the cost of driving entries, opening up the mine to mine the coal, having been originally charged to construction account as an expense of construction when the mine is abandoned and the coal intended to be taken therefrom has been taken out, what, from a bookkeeper's standpoint, ought to be done with the construction account in order to make it show, if anything, the true condition of the mine?

Question objected to by counsel for defendant, as incompetent.

A. It should be charged to profit and loss.
Q. It is available thereafter as an asset of the company?
A. No, sir.
Q. Should it be carried on the books as an asset?
A. No, sir.
Q. Is it in any way available, if the mine cannot be worked thereafter profitably, as an asset, whatever may have been expended in opening a mine?
A. It is not.

245 Cross-examination by Mr. TYLER:

Q. I understand you to say you had no experience either in mining or bookkeeping until you went with the Great Western Mining and Manufacturing Company in September, 1891; am I correct?
A. You are.
Q. You had no experience in either capacity, I understand?
A. As a bookkeeper I had kept some sets of books; this was the most practical work I had had.
Q. Not in mining affairs or bookkeeping for mining plants?
A. No.
Q. In what you have stated in regard to the condition of the Old mine, and the North mine so called, I understand you are giving a statement of what you have heard from others; is that true?
A. Yes, sir.
Q. You spoke of one of the mines at present operated connecting with the South mine, which mine is that?
A. The Annie mine.
Q. Does that connection give access to any part of the South mine that is desired?
A. No, sir.

Q. Does it not give access to the South mine?

A. It does.

Q. Do I understand you to say the South mine had been abandoned?

A. Yes, sir.

Q. Was it not abandoned, as you have heard?

A. Not that I ever heard of.

Q. For what reason was it abandoned, as you have heard?

A. Owing to the low coal.

Q. When a mine is abandoned would not the material used in opening it, rails, timbers, ties and so forth, be valuable for future use elsewhere to some extent?

A. Nothing but the T rails.

246 Q. Are the timbers not valuable?

A. No, sir.

Q. The tipple could be moved?

A. If it were steel, not the kind of tipple they build up there.

Q. Your knowledge in regard to the Great Western Mining and Manufacturing Company of a personal nature simply covers the time from September, 1891, to September, 1892?

A. And the time of the receivership?

Q. When was that, if you know?

A. I do not remember.

Q. When you began service with the Great Western Mining and Manufacturing Company were you under the direction of Mr. Howell?

A. Yes, sir.

Q. And your bookkeeping was largely the keeping accounts with the miners, with the laborers, was it not?

A. Yes, sir.

Q. And in regard to outside business you followed the direction of Mr. Howells?

A. Yes, sir.

Q. You were acting under his direction during that time of your employment?

A. Yes, sir.

Q. Had you anything to do with the general books of accounts of the company outside of the miners' accounts at that time?

A. Not during the operation of the company during the Great Western.

Q. Not while you were employed by the Great Western Mining Company?

A. No, sir.

Redirect examination by Mr. CLEVELAND:

—. Mr. Keps, do I understand you to say your testimony in regard to the condition of the mines in 1891 when you went there and since that time, has been hearsay, or the result of your personal observation?

247 A. I know as to the operation since that time.

Q. And do you know personally as to the condition of the Old mine, the North and South mine, and the Annie and Elizabeth mines in 1891, and since that time as to their being caved in or used?

A. You remember I said the Old mine and the North and South mine were abandoned before 1891, as to their condition all I know is what I see from surface indications and plats and hearsay.

Q. The fact they have not been used since 1891, and the fact that they were caved in in 1891 when you went there, is that a matter within your personal knowledge or otherwise?

A. I knew that to be a fact at the time.

By Mr. TYLER:

Q. Does your answer apply—now you speak of being caved in, does that answer apply to both of these mines, or three of those mines, or only the Old mine?

A. Well, I answer, the general impression is, when a mine is abandoned that there is nothing more to be gotten from it.

Mr. TYLER: That is your rereference?

Q. I ask you whether as a matter of fact in 1891 all three of those mines were caved in?

A. They were.

Q. Whatever the motive may have been for abandoning them they were in fact caved in in 1891?

A. Yes, sir.

Q. In reference to this South mine, you testified it connects with the Annie mine, that is to say, the Annie mine with the South mine in part.

A. Yes, sir.

Q. Can you tell now particularly, since that connection has been made, as to whether or not the coal in the South mine is so thin that it could not be worked profitably?

A. Yes, sir.

248 Q. Is that a matter within your personal knowledge?

A. It is.

Q. You have been asked about your bookkeping; I understand you, your testimony, when you first went there the books you kept were the accounts with the miners?

A. Yes, sir.

Q. You made some reference to the fact since that time they have included other books?

Mr. TYLER: Since the receivership.

Q. Yes; since the receivership?

A. Yes, sir.

Q. What books has your experience covered?

A. All the accounts of the company.

Q. Is there anything in the configuration of the ground or the dip of the seams in the South mine which would make the drainage of the mine, or the difficulty of draining the mine, the accumulation of water, the reason for not using the South mine?

A. I never ran levels through it.

Q. When the Annie mine ran into the South mine, was there anything to indicate that water had accumulated in the South mine, and that was the reason for abandoning its use?

A. There is no water in the entries we have struck.

Q. But there is this thinness of seam?

A. Yes, sir.

Q. You have spoken of this Peach Orchard coal and the thickness of seam; in view of the kind of coal it is making it unprofitable to work it?

A. Not kind but quantity; the quality is all right.

Q. Is there any difficulty in the seams as to shale, or otherwise, making it necessary that the seams should be of a certain thickness to make it profitable?

A. There must be height, and not too much muck.

249 Mr. TYLER: What do you mean by muck?

A. Slate.

Q. Muck is what becomes gob when it is taken out?

A. Yes, sir.

By Mr. TYLER:

Q. It is the name you give to waste that cannot be used?

A. Yes, sir; it is called gob when it is in the mine and muck when it is brought out.

Q. Are you familar with the dip of the seam of coal in the south mine?

A. The general dip is southeast.

Q. You mean by dip the direction of the inclination?

A. Yes, sir.

Q. A downward inclination?

A. Yes, sir.

Q. Do you know the exact extent of that dip?

A. No, I do not; I have seen the plats; I know what they say; I never measured it.

Q. Have you yourself ever taken any levels?

A. No, as to the dips of Peach Orchard they might run a certain dip one direction and then raise; the dips are local; they wave, but the general dip is to the southeast.

By Mr. CLEVELAND:

Q. As you understand, whether the south mine was free of water or full of water, the thinness of the seam prevents using it, does it not?

A. On a profitable basis.

The WITNESS: It is slate in the mine before it is dug; after it is

dug and thrown back in the room it is called gob, and after it is dumped out on the outside it is called muck.

By agreements of counsel witness signed the shorthand notes of his deposition.

250 WEDNESDAY, 2 P. M., *March* 28, 1900.

Present: Messrs. Cleveland, Black, Tyler, Carlisle and the commissioner.

Continuation of the examination of Mr. JOHN CARLISLE by Mr. CLEVELAND:

Q. Mr. Carlisle, have you prepared the statements of the different accounts in your individual books having a bearing on how you stood with the Great Western Mining and Manufacturing Company at the time of the receivership in 1889?

A. Yes, sir; I have.

Q. You have previously testified that one of those accounts shown in Ledger 5 of your individual books, under the title of the Great Western Mining and Manufacturing Company, was an account which showed money paid out by you on behalf of that company, and receipts by you, likewise, on behalf of that company; is that correct?

A. That is correct.

Q. And the balance according to your books, of that account due you on the first of January, 1892, was $2,752.30?

A. It was.

Q. And that corresponded with the books of the Great Western Mining and Manufacturing Company, as I remember?

A. Yes, sir.

Q. Will you point out to me the last entry made in that account prior to the appointment of the receiver in September, 1892?

A. I can; on page 298 of the ledger.

Q. What is it?

A. To cash, September 2, 1892, $911.99.

Q. That is made up of two items; paid note of Bird, $908.70; protest, $1.35; interest, $1.94; total, $3.29; a grand total of $911.99.

A. Yes, sir.

Q. Which is the balance of that date?

A. No, sir.

251 Q. What was the balance shown on that date by the books?

A. On the debit side there was charged against the Great Western Mining and Manufacturing Company $51,830.79, and there was credited up to September $21,901.97, leaving a balance of $29,928.82 charged against the company.

Q. That charge of $51,830.79 included, did it not, numerous notes which had been discounted by the Great Western Mining and Manufacturing Company and endorsed by you?

A. It included various notes given by the Great Western Mining and Manufacturing Company and endorsed by me, and also drafts made by the general manager of the company upon me and accepted by me.

Q. And which were not ultimately paid by you?

A. And which were not ultimately paid by me.

Q. I notice in this statement you have handed me, Exhibit 109A, that there are after the item of $911.99 on the debit side of that account numerous other items which appear to have been added subsequently and which aggregate some $30,000; what are those items?

A. They are composed of various items, two items of bills payable that were paid several years previously to Ford, Eaton & Company and had never been charged to the Great Western Mining and Manufacturing Company, but were charged simply to bills payable when they were paid. And then there were some bills receivable, Bird's notes, that had been credited to it which were unpaid, and which were charged back to it, and profits from the coal account that had been credited to it at one time by an error, and were charged back; also an error in coal account in charging salary of Manager Howell; also an item of income account, which is commission on sales of coal, in accordance with the resolution adopted by the directors at their previous meeting.

Q. Did you give coal account a corresponding credit of this $1,325?

252 A. I did.

Q. This matter of commission was included in your claim against the Great Western Mining and Manufacturing Company as made by your assignee, Mr. Woodward, was it not?

A. I do not remember about that; I do not remember what his claim was.

Q. These errors about Ford, Eaton & Co., which you have charged against this account, as I understand your statement and account, you claim to have paid certain notes in 1887, which you had given for the benefit of the Great Western Mining and Manufacturing Company?

A. For goods purchased, yes.

Q. For goods purchased in their behalf?

A. Yes, sir.

Q. When you gave those notes did not you charge them up to the Great Western Mining and Manufacturing Company?

A. No, I did not.

Q. As you were in the habit of doing?

A. No, I did not; that is the way I found the error.

Q. Were they not included in the books of the Great Western Mining and Manufacturing Company; or in your statement to them?

A. They were not included until afterwards, they are now in the books of the Great Western Mining and Manufacturing Company;

and that is the way I discovered I had never charged the Great Western Mining and Manufacturing Company.

Q. How did your and the Great Western Mining and Manufacturing Company's books then balance in 1892?

A. They were not charged until 1892; I was not credited on their books until 1892.

Q. With these?

A. Yes, sir, with these.

Q. What is the charge, "Carlisle Coal Co.," the same amount charged twice, $676.80?

253 A. Because when a barge of coal, barge No. 16, was sold the Carlisle Coal Company, in February, for $676.80, it was also credited again in March for $676.80, which made it twice, when it ought to have been only once.

Q. Why were these Bird notes charged back to this account?

A. Because they were unpaid.

Q. Well, had they been originally credited to the account?

A. They had been originally credited to the account.

Q. Well, didn't you discount them?

A. I had them discounted; yes, sir.

Q. Did not you get the money?

A. I got the money.

Q. Did you pay them?

A. And I paid them; yes, sir.

Q. Mr. Carlisle, those notes did not become due until after your assignment; now have you paid them?

A. Because the Great Western Mining and Manufacturing Company was credited with the notes when they were given to me, and one of which was used by me, which came due on the first of August, 1892, and was paid by me, and the note given August 2, 1892, was never used by me, and as I had credited them with those notes it was proper I should charge them back to them when they were unpaid.

Q. Did you use the second one?

A. No, not that I can find any account of it in my books.

Q. Why did you charge up this account or this note of John and G. W. Carlisle, $2,500, to the Great Western Mining and Manufacturing Company?

A. That was a note I had given the Great Western Mining and Manufacturing Company to get discounted and they received the proceeds. I never received the proceeds of it. It was for their benefit.

254 Q. Was [illegible] the proceeds of the notes charged to it when it received them?

A. I did not get the note discounted. I sent them our note which they had discounted, I think at Vanceburg.

Q. Was it paid by you?

A. No, sir.

Q. You charged it, then, because it is a liability of yours still owed by you?

A. Yes, sir.

Q. Why did you charge this profit on coal account back to the Great Western Mining and Manufacturing Company?

A. Because I had credited the coal account with all the sales of coal, notably to the Cincinnati, Hamilton and Dayton Railroad Company, and expected that would be paid, and therefore credited the Great Western Mining and Manufacturing Company with the profits or balance of coal account; but afterwards the C., H. & D. R. R. Co. brought in a number of charges for freight and switching, which I always considered were incorrect, which more than wiped out the balance I had against them, or about wiped it out. I think the receiver collected some of that afterwards; I do not know.

Q. Brought in claims against who?

A. Against the Great Western Mining and Manufacturing Company, or rather against the coal account. The way I did was to give coal account credit for all coals sold that I had purchased outside of the Great Western Mining and Manufacturing Company, and I credited them with their proportion of what was to come from the C., H. & D. and others; credited the coal account.

Q. Why should that be charged to them?

A. Because they had already been credited with it.

Q. Why were not they entitled to the credit?

A. Because it was never received.

255 Mr. TYLER: By you?

A. By me.

Q. You mean there was no profit on the coal, from January 1, 1892, to September 1, 1892, bought by you and sold?

A. I don't think there was any profit.

Q. Have you any statement of how much ought to have been properly charged to coal account as freight or otherwise, or claims of the C., H. & D.?

A. You will find it on that account I have submitted of coal account.

Q. What is the last entry on those books prior to the appointment of the receiver, of the credit account of the Great Western Mining and Manufacturing Company?

A. It is "By cash, $381.43."

Q. What are these subsequent credits here?

A. They are credits given for sales of coal.

Q. Which had been previously omitted?

A. Which had been previously omitted.

Q. These subsequent entries in red ink of notes unpaid, what are they made up of?

A. They are made up of notes given by the Great Western Mining and Manufacturing Company, and which I had endorsed and previously charged to them, as was my habit whenever I endorsed any paper.

Q. You expecting to pay them?

A. I expecting to pay them when they came due, as I had been accustomed to do; and as they were not paid they should properly be credited back to the Great Western Mining and Manufacturing Company.

Q. As you received the cash for their discount, I suppose?

A. No, I did not—some of it I did, but not all of it.

Q. Have you just charged back the ones you received?

A. I charged back all that I had endorsed.

256 Q. The Great Western Mining and Manufacturing Company did not get it, did it?

A. They got some of it, but not all of it.

Q. Whatever they got in any other form, as cash or otherwise, you charged to them?

A. I did. It was the habit, or custom, rather, of the general manager to make drafts on me for payrolls, and sometimes to get notes discounted, all of which he got the cash on and used for the company's benefit; all the others were for my benefit.

Mr. CLEVELAND: I offer this paper in evidence, marked "Exhibit 100 A."

Q. I show you another paper, marked 101A, which, purports, I understand, to be a copy of the account called coal account in your book?

A. Yes, sir.

Q. Will you tell me the last entry on that account as it appeared at the time of the appointment of the receiver?

A. The last entry was made in August on the debtor side. Cash, $125, and on the credit side, cash, $489.73, the same month.

Q. What are the subsequent items on the debtor side?

A. They are mainly charges for coal purchased in May, June, July and August that had not previously been entered.

Q. And what on the credit side?

A. They were credits given for sales of coal to different parties.

Q. That had not been entered?

A. That had not been entered.

Mr. CLEVELAND: I offer this in evidence; mark it Exhibit 101A.

Q. I show you another statement, which I mark 101B, purporting to be a transcript of your account as treasurer, "John Carlisle, treasurer of the Great Western Mining and Manufacturing

257 Company," has anything been added to that since the appointment of the receiver?

A. I think not.

Q. That represents money paid out by you by way of dividends and interest on bonds, does it not.

A. Yes.

Q. Were there any notes given by you to raise that money which were unpaid at the time of your assignment?

A. There was one given to the Covington City national bank for $6,000 in the month of May, for which I gave them an order on the C. H. & D. H. R. R. Co., to be paid in July and August following out of moneys due for the purchase of coal; one of those drafts was paid and the other was not on account of the differences between the Cincinnati, Hamilton and Dayton road and myself in regard to freight charges, as I stated before, that draft of $3,000 remained unpaid.

Q. Are there any other notes outstanding that are represented in there?

A. I think not.

Q. How about the dividend paid in July?

A. That was paid in cash.

Q. Was the money borrowed for it?

A. The money was not borrowed for it; no, sir.

Q. Where did the other $3,000 come from which made up to $9,000 paid in May?

A. I had the money on hand.

Q. That is, your individual money?

A. Yes, sir.

Q. Shouldn't this account then be credited with the $3,000 that has not been paid; is not it a claim against the Great Western Mining and Manufacturing Company?

A. Properly, I suppose, that is a claim against the Great Western Mining and Manufacturing Company which should be credited back on my books.

Q. Then how about the $3,000 bill of exchange given by the Great Western Mining and Manufacturing Company on F. H. Short?

258 A. That is the one I refer to as being unpaid.

Mr. CLEVELAND: I offer this in evidence, Exhibit 101B.

Q. Have you a transcript of the C. H. & D. coal account?

A. I have not taken it off.

Q. Referring to that account in your books, Mr. Carlisle, as I understand, whenever you delivered coal to the Cincinnati, Hamilton and Dayton railway you charged that amount on your books to that company, and credited either the Great Western Mining and Manufacturing Company account, or coal account?

A. Yes, sir.

Q. I notice that that account has now been balanced?

A. Yes, sir.

Q. That in April, 1893, it was balanced by a charge to coal account of $7,494.19?

A. Yes, sir.

Q. Are you able to state how you know that that is a correct charge to make to coal account, and why the C., H. & D. Railway Co. should have been given that credit?

A. That was the amount on my books due from the C., H. & D.

R. R. Co., and it was entered in that way to balance the account, because the C., H. & D. R. R. Co. claimed they did not owe it, that they had paid out that amount for freight and switching charges to the C. & O. R. R. Co.

Q. Is it not a fact, Mr. Carlisle, that you have given orders on the C., H. & D. R. R. Co. on coal deliveries made to the C., H. & D. R. R. Co. as payment or security for individual debts of your own in the amount of the $7,494.19?

A. It is a fact that I gave orders on the C., H. & D. R. R. Co. to secure notes that I had had discounted, which were really for the benefit of the Great Western Mining and Manufacturing Com-
259 pany, as they were continually drawing on me for money, and I had to borrow money to pay the drafts and notes that I endorsed to them.

Q. And is it not a further fact your creditors collected some of that amount from the C., H. & D. R. R. Co.?

A. I have heard that there was a part of that collected from the C., H. & D. R. R. Co., but the exact amount I do not know. I think it was in the neighborhood of $3,500.

Q. Whatever it was it ought to be credited, ought it not, on coal account?

A. No, it ought to be credited on the Great Western Mining and Manufacturing Company account.

Q. Well, it is the same thing. And whatever money you borrowed from people in order to meet drafts of the Great Western Mining and Manufacturing Company you have included in some of these accounts in the form of charges against the Great Western Mining and Manufacturing Company?

A. All the drafts made upon me as soon as I accepted them I charged the Great Western Mining and Manufacturing Company; it is possible I may have omitted some charges.

Adjourned to Thursday, 11 a. m., March 29, 1900.

Office of Mr. John Carlisle.

MARCH 29, 1900.

Present: Messrs. Cleveland, Black, Tyler, Carlisle and the commissioner.

Continuation of the examination of MR. JOHN CARLISLE by MR. CLEVELAND:

Q. Mr. Carlisle, have you a statement showing all notes which have been charged to the Great Western Mining and Manufacturing Company account as claimed by you on your books, or to
260 the coal account on your books, and which not being paid are to be credited back to those accounts, respectively?

A. I have (he produces a paper).

Mr. CLEVELAND: I offer this in evidence (marked Exhibit "101 C" by the commissioner and attached hereto and made a part hereof).

Q. What is the paper I show you, marked Exhibit "101 D"?

A. That is a summary of the balances due me from the Great Western Mining and Manufacturing Company according to my books, from the coal account and John Carlisle, treasurer, all from my books, making a total of $60,549.36, less notes and drafts endorsed by me and previously charged, which became due after September 2, 1892, but were unpaid, and should be credited to the Great Western Mining and Manufacturing Company and coal account, amounting to $43,886.80, leaving a balance due me of $16,662.56. There should be deducted from this summary the item of $3,000, being a draft held by the Covington City national bank on the C., H. & D. R. R. for $3,000, and also an item of $3,500, which I testified yesterday as having been paid by the C., H. & D. R. R. Co., to various holders of orders.

Mr. CLEVELAND: I offer that statement in evidence (marked "101 D" by the commissioner and attached hereto and made a part hereof).

Q. Mr. Carlisle, I show you an account attached to your deposition in case of Woodward, assignee, *vs.* Great Western Mining and Manufacturing Company, and ask you if you recognize it?

A. That looks like a copy of the account submitted by my assignee at that time, and I think is probably the one that was furnished by my bookkeeper.

Q. Is it in the handwriting of your bookkeeper?

A. No, sir, it is not; I do not know whose handwriting it is.

261 Q. The stenographer's, I guess. That shows a balance due you of $26,469.75?

A. Yes, sir.

Q. But that was made up before these subsequent entries you have referred to, as your books now show?

A. And was only the account of the Great Western Mining and Manufacturing Company, the individual account.

Mr. CLEVELAND: I offer that in evidence.

A copy is made by the commissioner marked Exhibit "101 E" and attached hereto and made a part hereof. It was agreed by counsel that a copy should be used instead of the original.

Q. Mr. Carlisle, was Mr. B. D. Harris at the time this suit was brought a citizen of Vermont?

A. Yes, sir.

Q. And G. D. Harris of what State?

A. New Hampshire.

Q. And you were a citizen of what State?

A. Ohio.

Q. And your brother, George Carlisle?
A. Ohio.
Q. And George S. Richardson?
A. California.
Q. And James C. Holden?
A. Mr. Holden was not a director at the time this suit was brought; Mr. Holden has resigned and Mr. Scott was elected in his place.
Q. In 1889?
A. Yes, sir; in 1889 Mr. Holden was a citizen of New Jersey.
Q. And Mr. L. Hinsdale?
A. He was a director in 1889, and was a citizen of Ohio.
Q. He has always been a citizen of Ohio, has not he?
A. Yes, sir.

262 Recross-examination by Mr. TYLER:

Q. Mr. Carlisle, you have testified heretofore that all of the indebtedness of the Great Western Mining and Manufacturing Company existing at the time of the issue of $300,000 of bonds had been paid prior to the appointment of a receiver, have you not?
A. Yes, sir, I did.
Q. Can you produce a statement of the indebtedness existing at that time, and the dates of payment of said indebtedness; if so, please produce such statement and make the same an exhibit?
A. I have prepared a statement from the books of the Great Western Mining and Manufacturing Company showing the amount of indebtedness existing on the 1st of July, 1889, and the dates when that indebtedness has been paid off and cancelled. I now produce it and mark it Exhibit 105 and make it a part of my deposition.

Marked Exhibit "105" by the commissioner and attached hereto and made a part hereof.

Mr. CLEVELAND: I want to offer in evidence ledger heretofore marked Exhibit "3," of the Great Western Mining and Manufacturing Company; journal marked Exhibit "4," same company; journal marked Exhibit "5," same company; ledger marked Exhibit "6," same company; journal marked Exhibit "7," same company. I offer them in evidence, and it is stipulated and agreed between counsel, the said Exhibits 3 to 7, inclusive, need not be attached to the testimony, but that the same, identified by numbers as heretofore, and by the signature of the special examiner, may be produced at the hearing and used by either party with the same force and effect as if regularly attached.

Mr. CLEVELAND: I also want to offer in evidence the minute book of the Great Western Mining and Manufacturing Company.

Marked by the commissioner Exhibit "105." And it is
263 agreed by counsel that the same may be identified by the above number and signature of the special examiner, and need not be attached to the testimony, but may be produced at the

hearing and used with the same force and effect as if regularly attached.

Mr. CLEVELAND: I want to also offer in evidence a copy of the charter (printed copy) of the Great Western Mining and Manufacturing Company.

Marked Exhibit "107" by the commissioner and attached hereto and made a part hereof.

(Signed) JOHN CARLISLE.

End of deposition of Mr. John Carlisle.

And also Mr. BLACK, of lawful age, being first duly cautioned and sworn, deposes and says as follows:

Direct-examination by Mr. CLEVELAND:

Q. You are a receiver of the Great Western Mining and Manufacturing Company?

A. I am.

Q. When were you appointed?

A. I think it was on the 13th day of September, 1892.

Q. In what case?

A. S. Woodward, assignee of John Carlisle *vs.* The Great Western Mining and Manufacturing Company, in the United States circuit court for the district of Kentucky.

Q. And you have been acting as receiver since that time?

A. Yes, sir.

Q. Have you the order appointing you receiver?

A. (Producing a paper.) Here it is.

Mr. CLEVELAND: I offer in evidence a copy (marked Exhibit "107 A" by the commissioner and attached hereto and made a part hereof.)

264 Q. When did this matter of this claim against the directors of the Great Western Mining and Manufacturing Company involved in this suit come to your attention, Mr. Black?

A. In March, 1894.

Q. Did you make any application to the court for instructions?

A. I did.

Q. And did the court make an order?

A. The court did.

Q. Have you got that application and order?

A. I have.

Mr. CLEVELAND: I offer those in evidence, copies. (Marked Exhibit "108" and "109" by the commissioner and attached hereto and made a part hereof.)

Q. Did you also file a report of the indebtedness of this company at the time of your appointment as receiver?

A. I filed the report after the appointment as receiver showing what I then understood was claimed to be the indebtedness of the company, and also a report of my proceedings as receiver up to that time.

Q. Were you also appointed as master by the court to determine the amount of indebtedness at the time of the appointment of the receiver?

A. I was, and to sell the property.

Q. I hand you herewith your report as receiver of the claims against you, and also your report as master, and ask you if they are the reports you filed in that case in those capacities?

A. They are.

Mr. CLEVELAND: I offer those in evidence, copies. (Marked Exhibit "110" and "111" by the commissioner, and attached hereto and made a part hereof.)

Q. You also sold the property under foreclosure decree, did you?

A. As master, I did.

265 Q. (Handing witness paper.) I ask you if the paper I hand you is the decree of confirmation of that sale?

A. It is.

Q. (Handing witness paper.) And if the other paper I hand you is the order of distribution of the proceeds thereof?

A. It is.

Mr. CLEVELAND: I offer these in evidence. (Marked Exhibits "112" and "113" by the commissioner and attached hereto and made a part hereof.)

Q. What assets came into your hands, Mr. Black, as receiver?

A. The mining plaint at Peach Orchard, Kentucky, which consisted of 4,000 acres of land held in fee, and mineral right on 2,000 acres more and mining machinery, equipment, tipple, cars, and all other property in that plant, and also a stock of goods of merchandise used as a supply house in the operation of the mines; there were also some book accounts, which the company had at that time.

Q. The decree of confirmation and distribution show what was realized from the sale of the real estate and fixtures connected with it?

A. Yes, sir.

Q. And also from the sale of the personal property?

A. Yes.

Q. How much did you collect outside of those two assets—on book account; approximately will do?

A. To answer approximately, I should say from $4,000 to $5,000.

Q. Were there any other assets came into your hands?

A. No, no other assets. The decree of confirmation and order of distribution do not show the net amount realized on the sales of the property belonging to the property, for the reason that they

266 show the gross amounts received, without deducting therefrom any amount for the expenses of the receivership, or the

expenses in the action in which the property was sold; those expenses amounted in gross to about $16,000.

Q. Do you remember, Mr. Black, at the time that certain letters were produced, or copies of letters produced which passed between Mr. Carlisle and Mr. B. D. Harris, of Mr. Carlisle furnishing you extracts from said letters, he not being willing or refusing to allow us to have the originals?

A. I remember the matter.

Q. Did you have copied those extracts that he furnished you, which is marked Exhibit "98" in this case?

A. They were copied under my supervision in my office, by Miss Schroeder, my stenographer.

Q. I want to show you carbon copy, Exhibit "98," part of it on page 13, being a letter from B. D. Harris to John Carlisle, dated Brattleboro, Vermont, June 3, 1889, and call your attention to this sentence: "Our plan was to sell $300,000 bonds with a bonus of $150,000 stock outright and positively for the net sum of $255,000 and not to buy at all." I notice on this exhibit now the words "a bonus of" enclosed in parenthesis in lead pencil, and a lead pencil line is run through it; I want to ask you whether you can state whether at the time that memorandum was handed you by Mr. Carlisle and at the time it was copied at your office, those words were included?

At this point, on account of a telephone message to Mr. Cleveland requiring his going to his office, the meeting was adjourned to March the 30th, 1.15 p. m. same place, when the same parties were present. Question was read by the commissioner.

A. I recall a copy of the letter mentioned contained in Exhibit "98." I also recall the letter of which that is a copy of which the item in Exhibit "98" is a copy; said letters together with
267 other letters and memoranda of letters furnished by Mr. John Carlisle, were copied in my office by Miss Schroeder under my supervision, the words "a bonus of" were included in the copy taken off at the time Miss Schroeder made the copy, and I have a recollection that the same words also appear on the letter, the original letter, exhibited.

Q. Mr. Black, I show you the letter, the original letter of B. D. Harris, to Mr. Carlisle, dated June 3, 1889; do you recognize that as the letter handed by Mr. Carlisle to make the copy from?

A. I do.

Q. I notice on that the words are erased on the third page corresponding with the words in the copy Exhibit "98" already referred to; do you know anything about how that erasure came about?

A. I do not; this letter I first saw in Mr. Carlisle's office during the taking of the depositions in this case, and the words "with a bonus of" were then there erased.

Mr. CLEVELAND: I offer this original letter in evidence.

Marked Exhibit "114" by the commissioner and attached hereto and made a part hereof.

Cross-examination by Mr. TYLER:

Q. When were you appointed receiver of the Great Western Mining and Manufacturing Company?

A. My recollection is it was the 13th day of September, 1892.

Q. How long did you carry on the business before foreclosing it?

A. The record will show, but my best recollection is that as receiver my operations ceased on the 1st of March, 1894, although it may have been the 15th of February.

Q. Was there a suit brought to foreclose the mortgage, a separate suit?

268 A. No, the sale of the property was brought about in the action in which the receiver was appointed, a cross-petition having been filed by the trustee under the trust deed securing the mortgage bond.

Q. When was that done?

A. It was done in the year 1893, but just the time I can't tell you, the record would show definitely, I can't give you the exact date, if you think it important.

Q. No. Was not the business carried on by you as receiver a profitable one, that is, were not there net profits?

A. The operations of the receiver from September, 1892, until February or March, 1893, were at a profit; subsequent to that time, they were not profitable, and I can explain if it be necessary, the reason.

Q. Well, you can use your own judgment about that?

A. The summer and fall of 1892 were exceedingly dry, in this part of the country, and the Ohio river, over which coal comes from Pittsburg, was in such a state no coal was received on it, if I remember in this market until towards the spring of 1893, or at least late in the winter. That gave a fine market and good prices to all rail coal; and as Peach Orchard coal was delivered by rail we had a very good market for it. But after that time, by reason of the competition of Pittsburg coal, the market was not nearly so good, and our operations were not so profitable.

Q. Upon whose cross-petition was the decree of sale rendered?

A. On the cross-petition of the trustee under the trust deed, which was the Mercantile Trust and Deposit Company of Baltimore, Maryland, the trustee under the bond.

Q. When was the property sold?

A. The sale was made on Saturday, December 23, 1893.

269 Q. For what price?

A. The real estate and mining plant sold for $70,000; the stock of goods in the store was sold for $5,666.67.

Q. Who was the purchaser?

A. The purchaser was a committee representing the mortgage bondholders.

Q. How was the property sold—by private sale or public sale?

A. By public vendue, under order of court.

Q. How many buyers were there?

A. But one.

Q. Who represented the Mercantile Trust Company as attorney?

A. The counsel who first appeared for the trustee was the firm of Mallon, Coffey & Mallon; I believe, however, before the order of sale was taken, Mallon, Coffey & Mallon retired and Matthews & Cleveland represented the trust company.

Q. Were not the earnings of the company under the receivership sufficient to pay the interest on the bonded indebtedness?

A. It was not. In order to answer that a little more specifically, I would say the earnings made from September, 1892, to the early part of 1893 were on a basis which, if continued, would probably have been sufficient to pay the interest on the mortgage indebtedness, but I have already stated, those earnings grew out of rather exceptional circumstances.

Q. What was done with the property by the purchaser?

A. The purchasers, I am advised and believe, have continued to operate the property as an active mining enterprise.

Q. Under a corporate organization?

A. Yes, sir; they organized as a corporation.

Q. Were you instrumental in organizing that corporation?

A. I do not think I had anything to do with that; I don't
270 recall that I had anything, unless it might be to attend to some details, or give some little advice to strangers who were here for the purpose of organizing; I had no official connection with it.

Q. Are you not interested in the present corporation operating the mine?

A. I am not to the extent of a penny.

Q. Were you not in the beginning?

A. I was not in the beginning; no, sir.

Q. Was not the entry directing you to begin this action prepared and handed up to the court, and entered, without any examination of the case by the judge himself, personally?

A. I have no recollection of the circumstances under which the report was made by the receiver to the court and the order made by the court other than that in the taking of the deposition heretofore referred to, that is, the deposition in which testimony was taken with reference to claim which the receiver was to report on as master—I say, in the taking of that deposition or under it, my attention was called to the matter of the floating of the bonds and the sale of the stock by the stockholders of the company, and I deemed it my duty to call the court's attention to that in order to take the direction of the court. Whether I prepared the report, or whether it was prepared by Matthews & Cleveland, I cannot say; whether I pre-

pared the order personally, or whether it was prepared by others, I cannot say, I only remember I made the report to the court. As to whether or not the court made any examination into the facts covered by the report, whether he examined the deposition or called for any evidence I cannot say, as I have no recollection whether the report was made in open court and the order in open court or in chambers.

Q. How did you happen to make that report to the court?

A. This matter was called to my attention, and I conceived the idea that the assets of the company had been diverted from
271 the company's use, and it was my duty as receiver to call the court's attention to it, in order that the court might take such action about it as the court deemed best.

Q. Who suggested to you that ought to be done?

A. It occurred to me myself in that connection; I talked with the receiver's counsel, and they wholly confirmed my view of the legal hearings of the transaction.

Q. Who were your counsel?

A. Matthews & Cleveland.

Q. They were also the counsel for the bondholders, were they not?

A. They acted as attorneys in taking the order of sale and in prosecuting the proceedings for the sale of the property; they were not the original counsel.

Q. Do you remember whether Elliott, Johnson & Co. called your attention to that circumstance or not?

A. No, I do not think they did. My recollection is, when the parties were here, that is, Mr. Scott, of Elliott, Johnson, was here in connection with the closing up of the sale of the property, that I then called his attention to that matter. Along with Mr. Scott were other gentlemen—Mr. Graham and several gentlemen from Philadelphia; my recollection is, on that occasion I certainly told Mr. Scott and perhaps all of them about the matter.

Q. As receiver, did you make any report to the bondholders of the earnings of the company at any time?

A. I cannot answer that question definitely, because of the fact you put in "as receiver"; I do not think I did as receiver; I think I did make what might be called an advisory report, or statement, it might be to the bondholders, of the period I have referred to, from September, 1892, to March, 1893. That was made at their request, so as to know what the property was doing. They were then formulating plans, or about to formulate plans, for reorganization,
272 and they wanted to know what the property was doing under the receiver, and I think I made a printed statement to them.

Q. Please furnish a copy of it.

A. I do not think I have. I am sure I have no copy of it whatsoever. There were probably forty or fifty bondholders; whether I had their addresses and sent them or whether I sent them to Mr.

Scott and he sent them around to the bondholders I do not know; I am inclined to think I sent them to Mr. Scott, and he having the addresses just distributed them to the people who owned the bonds. It was not a matter I did under my official capacity, and I did not keep any copy, it was just a favor to the people in interest.

Q. You are unable to furnish a copy now?

A. I am unable to furnish a copy now. My recollection is the substance of it was, the property was then earning—the experience from September, 1892, to the early part of 1893, whatever the period was, showed the property was earning sufficient if that rate could be maintained, to pay the interest on the bonds. But as I have already stated, that period was somewhat delusive because of the exceptional condition that governed at that time.

Q. Did you pay the interest on the bonds?

A. I did not. An application was filed in the court asking that the receiver pay interest out of accumulated earnings; but this application was filed I think some time in the summer of 1893, but at that time it was apparent that the receiver was losing money and not making it, and for that reason, I presume the application was never pressed, at any rate it was never acted upon by the court.

Q. Please try and find a copy of that statement or report you furnished to the bondholders, or for the bondholders, and make it an exhibit to your deposition.

A. I will endeavor to find one and attach it. (If found to be marked Exhibit "115" and attached hereto and made a part hereof.)

273 Redirect examination by Mr. CLEVELAND:

Q. Mr. Black, did your receivership during its continuance and up to the time of the decree of foreclosure and sale, pay its expenses?

A. I never cast a precise account of that, for the accounts were always somewhat uncertain by reason of the fact that there were accounts on hand at the time I became receiver which went into the general fund, and I did not keep those funds in a separate account, but I think I am safe in saying that if the business made any money at all during the entire period of the receivership it was very little, and could not have amounted to $1,500 in that period, net money, and I am not taking into account any interest on capital or otherwise, but simply the running of it.

Q. Even during the first few months of your receivership when the conditions existed, as you mentioned, and you made money, was enough money earned if that had continued to have paid all the interest of bonds as well as the floating indebtedness?

A. No, it would not; the floating indebtedness turned out to be about, something like $80,000 or near to $100,000.

Recross-examination by Mr. TYLER:

Q. I ask whether you had any experience in the operation of coal mines prior to your appointment as receiver, and business connected therewith?

A. No, I had had no experience whatever, and I did not undertake the responsibility of any direct management, but I continued the same employees and the same manager who had previously been employed before the receivership.

Q. Up to what time was he continued?

A. Throughout the entire receivership; and he remained with the company after its sale and reorganization for a period, I think, of nearly a year, L. C. Black.

274 And afterwards, and on the 17th day of June, A. D. 1901, said cause came on for final hearing before the Hon. Hoyt H. Wheeler, judge United States circuit court, sitting in equity.

And afterwards, and on the 17th day of October, A. D. 1901, the court handed down its decision in said cause ordering decree for plaintiff for the sum of $15,000; which said decision is in the words and figures following:

United States Circuit Court, District of Vermont.

GREAT WESTERN MINING AND MANUFACTURING CO., by L. C. Black, Receiver, *vs.* B. D. HARRIS' ESTATE, CHARLES A. HARRIS ET AL., Executors. } In Equity.

The Great Western Mining and Manufacturing Co. was a corporation of Kentucky with a capital stock of $200,000 in shares of $100 each of which the defendant's testator, a citizen of Vermont, held 600, and a brother of the testator 600, bought in 1883 at $30 per share, another person 440, another 300, another 52, and two others 4 each. The five largest stockholders were the directors, and the testator was the president. It had lands, mines and transportation facilities in Kentucky and largely produced and sold coal. It issued $50,000 of new stock ratably to the stockholders in January, 1888, and it owed $131,585.03 December 31, 1888. Negotiations
275 for placing $300,000 of mortgage bonds had been going on, and offers had been made for the sale of them at 60 % without finding purchasers. A proposition was made by brokers to the directors April 18, 1889 for putting them on sale at 85 %, with a bonus of half as much stock as of bonds. At the annual meeting April 22:

"The attention of the stockholders being called to the large amount of net earnings being used for construction and betterments, the following resolution was presented, and after consideration, was adopted, to wit:

"Whereas, there have been expended for permanent improvements and betterments including machinery, barges, flats, &c., during the years 1884, 1885, 1886, 1887 and 1888, more than $160,000, all of which sum has been furnished from the net earnings of the company, and fairly belongs to the stockholders of the company

Therefore, *Resolved*, That the directors of this company be and hereby are authorized and requested to direct the president and secretary of the company to issue one thousand shares of the capital stock of the company to be divided *pro rata* among the present stockholders of this company as follows:

To B. D. Harris	300 shares
G. D. Harris	300 shares
John Carlisle	220 shares
G. W. Carlisle	150 shares
George S. Richardson	26 shares
James C. Holden	2 shares
L. Hinsdale	2 shares

The matter of negotiating a loan for the benefit of the company was also taken up and a resolution authorizing the loan to the amount of $300,000 for which bonds were to be issued, was approved."

On the same day the directors voted:

"That the president and secretary of the company shall
276 arrange for the sale of the $300,000 bonds aforesaid in their discretion at the bost price obtainable and the proceeds thereof shall be applied to the cancellation and retirement of $60,000 first mortgage 7% bonds dated January 1, 1884, not outstanding also to the payment of all floating indebtedness incurred up to the date hereof, for material and construction, and the balance shall be used by the directors for the best interests of the company."

They also passed the following resolutions:

"Whereas, at the annual meeting of the stockholders of this company a resolution was adopted requesting the directors to issue additional capital stock of this company to the amount of $100,000 to be divided *pro rata* among the present stockholders and based upon the fact that during the last five years more than $160,000 of the net earnings of the company, have been expended for permanent improvements and betterments thereby adding that amount to the assets of the company which belong to the stockholders of the company,

Therefore, resolved, that the president and secretary of this company are hereby directed to issue one thousand shares of the capital stock of the company to the present stockholders in proportion to the amount of stock already owned by them respectively."

A transaction took place among the stockholders as such and the directors as such, as shown by the following extracts from the records of the company:

"*Proposition of Stockholders of the Great Western Mining and Manufacturing Company to the Directors of said Company.*

"Whereas, the directors of the Great Western Mining and Manufacturing Company have taken steps to borrow the sum of
277 $300,000 to be used in payment of existing indebtedness of the company and to provide additional working capital, &c., and have authorized the president and secretary to execute bonds for said amount, and to negotiate the same at the best price obtainable.

And whereas, we are informed that it will probably be possible to find purchasers for said bonds at the price of eighty-five per cent. of the par value thereof, provided stock of the company, to the extent of fifty per cent. of the par value of the said bonds, shall also be transferred to the several purchasers of said bonds;

And whereas, it is deemed to be inexpedient to issue any new stock of the company for such purpose; and desiring to do all we can to assist the directors in procuring said loan and the sale of said bonds;

We therefore make this proposition to the directors of the company in reference to the sale of stock held by us in said company, to the purchasers of the said bonds, to-wit:

We will sell to the several purchasers of said bonds of the company, stock of the company belonging to us, in the amounts set opposite to our names respectively, and will furnish to the secretary of the company certificates of said stock, assigned in blank, to be by him delivered to said purchasers of said bonds, upon the understanding and agreement, that we are to receive the sum of $50 for each share of stock so sold by us, out of the money paid for said bonds and said secretary shall act as our agent in receiving said amounts, and shall pay us the same, before the company shall be entitled to have the remainder of the money paid for said bonds, by the purchasers thereof.

This action is not to be constructed as a proposition to sell said stock to the company, but it is to be treated and regarded as a sale of stock directly to the purchasers of said bonds, to be paid
278 for by them to us and the payment by them to the secretary of this company, for said bonds, shall be regarded as a payment to us for said stock to the extent necessary to pay us therefor upon the terms above stated.

In testimony whereof, we have hereunto set our hands on this third day of May, 1889.

B. D. HARRIS	450 shares
G. D. HARRIS	450 shares
JOHN CARLISLE	336 shares
GEO. S. RICHARDSON	39 shares
G. W. CARLISLE	225 shares
Total	1,500 shares

After full consideration of the proposition, the same was accepted and the secretary was authorized to act as the agent for said stockholders, in the proposed sale of their stock and the collection of the purchase money therefor, and directed to turn over the net proceeds of the sale of bonds into the treasurer of the company."

A mortgage was made, and $300,000 of bonds bearing 6 per cent. semi-annual interest, dated June 1, 1889, and sold in several various amounts with half as much stock transferred in blank and deposited ratably by the stockholders with the treasurer, who delivered it with the bonds to the takers of them respectively. The stock of the testator was transferred at various times between September 7, 1887 and March 7, 1890. Of the money received by the treasurer for the bonds and stock 25.90 being 50 per cent. of the stock, was paid by the treasurer to the several stockholders furnishing the stock. The testator furnished 450 shares of the stock, and received $22,500 of the proceeds of the bonds and stock in that manner; all the stockholders received $75,000; and the corporation retained $180,000. The avails of the loan, $255,000, were entered as such on the books of the corporation, and the $75,000 paid to the stockholders was entered as an expense of the loan. The $22,500 was sent to and
279 received by the testator, and this bond transaction was closed in 1890. The business of the corporation was continued, debts were created, dividends were declared and paid to those holding the stock that went with the bonds, but none to the testator upon his original stock after January 1, 1891; and interest coupons from the bonds were paid till 1892, when the receiver was appointed, on a creditor's bill, by the circuit court of the United States for the district of Kentucky. The mortgage was foreclosed by intervention in that suit, and the property covered by the mortgage was sold for $70,000 and the other property for $5,666.67. The avails of the mortgaged property after deducting expenses were applied on the mortgage debt leaving the remainder thereof, amounting to more than the face of the bonds still due. The other debts amounted to $122,221.32. This suit was brought by direction of that court in July, 1895, to charge the testator with the $75,000 paid to him and the other stockholders, and for other losses of the corporation alleged to have been caused by mismanagement and negligence of the directors, but all claims except as to the issues of $50,000 of stock in 1888, and of $100,000 of stock in 1889, and the $75,000 received by the stockholders from the bond and stock transaction have, on the argument, been waived.

The defenses set up to this claim for money withdrawn from the corporation, and relied upon, are principally that the corporation was solvent at the times of the respective increases and distributions of the stock, and that they were, therefore, lawful and proper; that the stock was sold by the stockholders directly to the bondholders, wherefore the money received for it was not withdrawn from the corporation; that all debts existing at the time of either of the in-

creases of stock have been fully paid, and that then future creditors have no cause to complain; that the statutes of Kentucky on this subject have not been pleaded, proved or followed; laches;
280 and the statutes of limitations of Kentucky. This suit is not brought upon any statute of Kentucky; but, like Briggs *vs.* Spaulding, 141 U. S., 132, is founded upon the common law liability for misfeasance and negligence in the performance by the testator of his duties as a director and president of the corporation about withdrawing and allowing the withdrawal of these moneys from the corporation; and statutes of that State providing other liabilities would not exclude these any more than the provision of other liabilities of directors by the national bank act excluded such common law liability in that case. No statute of limitations is set up, and if any was to be, that of Vermont, with the courts of which State this court has concurrent jurisdiction, would govern (Bauserman *vs.* Blunt, 147 U. S., 647). The limitation of the State statutes applicable is six years (Vermont Statutes, sec. 1199). This suit was brought within that time after the withdrawal and receipt of the money by the testator.

That the assets of an insolvent corporation are impressed with a trust for the payment of its debts, and cannot be withdrawn by the stockholders without providing for the debts does not here appear to be and could not well be disputed (Graham *vs.* Railroad Co., 102 U. S., 148; Wabash, St. Louis & Pacific Railway Co. *vs.* Ham, 114 U. S., 587; Richardson *vs.* Green, 133 U. S., 30). The substance of the plaintiff's claim is for the withdrawal of the money received for the mortgage bonds, and not for the increases of stock, and the question of solvency would refer to the situation at the time of the withdrawal. The prior debts had then been or soon were paid, but the mortgage bonds were outstanding, and the avails of them were what paid the prior debts. They were debts of the corporation, and, in view of the whole situation as shown by the evidence, they amounted to as much, at least, as the corporation could at most pay, and the depletion of any part of the $75,000 that came from the corporation would be more than it could spare. The increase of stock
281 were far within the limits of the power of the corporation, and these issues of it ratably to the stockholders would, as between themselves, own the corporate property in the same proportions as before. Outsiders would not be affected till reached; then they would be entitled to stand upon their rights to protect themselves. The first increase of stock was made more than a year before there appears to have been any suggestion of using stock to effect a loan, and to have been entirely separate from the bond transaction. When made and ratably divided, it would not of itself affect at all the stockholders as between themselves or outsiders. If sold to others, whether it was valuable or not, or at a fair or unfair price, the corporation would not be pecuniarily affected. If it brought 25 cents of the 85 cents on the dollar of the face of the bonds that the stock and bonds brought, that part would belong to

the stockholders furnishing the stock, and not to the corporation, and the receiving of that by the stockholders would not be depleting the assets of the corporation. The bonds would not float at 60; the bonds and stock would at 85; the inference follows that the bonds brought 60, and the stock 25. The stockholders and directors agreed to this among themselves more than to others, the property of the corporation to the detriment of creditors, they are not precluded from dealing fairly with any of their number in respect to what is his own. This deal may not have been fair to the takers of the bonds and stock for want of value of the stock, but the point here is whether there was a fair division between the corporation and the stockholders of the avails of the transaction as it was, fair or unfair, according to the proposition of the consideration furnished by each. The amount received for this issue of stock, in this view, was $25,000, of which defendant's testator received $7,500, as the price of the stock furnished by him that did not come from the last issue, but had been divided to and become his before
282 any negotiation of the bonds, as well as any of his prior stock had.

The last issue of stock was concurrent with the issue and negotiation of the bonds and stock, and that stock moved as much from the corporation to the new bondholders as if it had been issued directly to them, instead of through the prior stockholders to the bondholders. Neither statement in the vote of this stock that it was based upon the expenditure of net earnings for permanent improvements, nor the provision in the proposal of the stockholders that the secretary should act as their agent in transferring the stock and receiving the money, nor the protest that the action should not be construed as a sale of the stock to the company but should be regarded as a sale to the purchasers of the bonds, could alter the nature of the transaction, or its source or its place as a part of the consideration for the money received from the bondholders. The whole moved from the corporation, and the transaction wrought a depletion of assets of the corporation needed to make the bonds good, and to which the bondholders were entitled, if necessary, for the payment or security of the bonds. There was no agreement between the stockholders themselves; as to the bondholders according to the evidence it was a mere bonus to float the bonds. The stockholders receiving the money took it with the risk of its being required to make the bonds good. It is so required, and the plaintiff as receiver represents the rights of the bondholders as creditors in respect to it (Briggs *vs.* Spaulding, 141 U. S., 132.) The avails of this increase were $50,000 of which the testator received $15,000.

The plaintiff claims that the testator is liable not only for what he drew out of the assets and received himself, but for what the others drew out and received amounting to the whole $75,000, and inclusively the whole $50,000 which all drew out and re-
283 ceived in connection with the last increase of stock. They did not however become liable jointly because they consti-

tuted a board, and are sometimes called trustees. They are not invested with title as a joint board, but are rather managing agents whose relations to the property are several and personal, and not those of a joint trust estate (Briggs *vs.* Spaulding, 141 U. S., 132.) If it had all been received by the directors together and divided among themselves all would probably have been liable together and for each for the whole till all should be recovered; but each received his share separately, without connection with the others, from the avails of the sale of the bonds that his stock went with. Each may have been liable for the whole loss for neglect of personal duty in not preventing it, but not for the money itself. An action on the case might have lain against all, but if one had been brought it could not have been revived against the executors of the testator and prosecuted, but would have survived only against the others, and the executors could not have been proceeded against but by a new suit on what would survive (Seaman *vs.* Slater, 18 Fed., 485). This suit has been and could be revived only as to and for what would survive, and can be prosecuted only for that. This is governed wholly by the laws of the State where the suit is brought and being proceeded with (Baltimore and Ohio R. R. Co. *vs.* Joy, 173 U. S., 226). General principles derived from similar laws elsewhere are of course applicable. U. S. *vs.* Daniels, 6 How. (U. S.), 11, was an action on the case against a marshal for neglect of duty. Mr. Justice McLean said:

"If the person charged has secured no benefit to himself at the expense of the sufferer, the cause of action is said not to survive; but where, by means of the offense, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor."

The statute of North Carolina, upon which the question
284 arose, and which provided that action on the case should not abate death, was held not to vary this principle.

Upon the same principle an action for causing a pauper to become chargeable upon a town was held not to survive (Winhall *vs.* Sawyer, 45 Vt., 466). And in this court an action against a director of a national bank for personal neglect of duty has been held not to survive (Witter *vs.* Foster, 26 Fed., 737). In Briggs *vs.* Spaulding, 141 U. S., 132, which was Movius *vs.* Lee in the circuit court, 30 Fed., 298, there was decree against executors for defaults of directors of a national bank, but it was rendered without question upon the bill taken *pro confesso*, and not upon consideration or judgment of either court. That case is therefore not understood to be an authority for the survival of a suit against directors for mere neglect or misfeasance not affecting the estate of the testator.

The result of these views is that the plaintiff is entitled to a decree for the amount received by the testator through the last issue of stock.

Decree for plaintiff for $15,000.

HOYT H. WHEELER.

Cleveland & Bowler and Dillingham, Huse & Howland, for plaintiff.

Waterman & Martin and John Seymour Wood, for defendants.

And afterwards, and on the 2d day of December, 1901, notice of resignation of Henry H. Hollister and Chas. A. Harris, two of the executors of the estate of B. D. Harris, was filed in said cause, which said notice of resignation is in the words and figures following:

285 United States Circuit Court, District of Vermont.

GREAT WESTERN MINING AND MANUFACTURING COMPANY *vs.* B. D. HARRIS ESTATE ET ALS. } In Equity.

To the judges of the circuit court for the district of Vermont:

And now comes Sarah B. Harris, one of the executors of the last will and testament of said B. D. Harris, and gives said court to understand that Henry H. Hollister and Charles A. Harris, two of the executors of said will, resigned as such executors on the 20th day of August, A. D. 1901, and their resignations were on the same day accepted by the probate court having jurisdiction of said estate, as appears from the copy of record from the probate court for the district of Marlboro, in the State of Vermont.

SARAH B. HARRIS,
By WATERMAN & MARTIN,
Her Solicitors.

286 STATE OF VERMONT, *District of Marlboro,* } *ss:*

In Probate Court, August 20, 1901.

The following instrument is present in court:

"BRATTLEBORO, VERMONT, *August* 20, 1901.

To the Hon. E. L. Waterman, judge of probate, district of Marlboro:

We, the undersigned, executors of the will of the late B. D. Harris, hereby resign as executors of said will, to take effect from this date.

H. H. HOLLISTER.
C. A. HARRIS."

and the same is duly filed and ordered to be recorded, and the resignation of said H. H. Hollister and C. A. Harris as executors of the last will and testament of said B. D. Harris is accepted.

(A true copy of record.)
Attest:

A. F. SCHWENK, *Register.*

And afterwards and on the 28th day of March, A. D. 1902, a final decree was filed and entered in said cause, which said decree is in the words and figures following:

287 At a stated term of the United States circuit court for the district of Vermont, held at Burlington on the twenty-fifth day of February, 1902.

Present: Hon. Hoyt H. Wheeler, circuit judge.

THE GREAT WESTERN MINING AND MANUFACTURING Company, by L. C. Black, Receiver,
v.
CHARLES A. HARRIS, HENRY D. HOLLISTER, and Sarah B. Harris, as Executors of the Last Will and Testament of B. D. Harris, Deceased. } In Equity.

This cause having come on to be heard upon the pleadings, proofs and proceedings herein, and having been argued by H. Cleveland, Esq., for the complainant, and E. L. Waterman, Esq., for the defendants, and the complainant's claim having been stated as follows:

The complainant, therefore, claims a declaration by the court that the estate of B. D. Harris is liable.

(1.) For the sum of $75,000 as a joint and several liability of the directors and officers of the company, with interest thereon from January 11, 1890, the first date shown by the record that the $75,000 had been taken from the company (Exhibit 98 letter, John Carlisle to B. D. Harris, dated January 11, 1890).

(2.) For $45,000 as a several liability as stockholder, on ac-
288 count of the issue to himself, without consideration, on January 11, 1888, of one hundred and fifty shares or $15,000 of stock, and on April 22, 1889, three hundred shares or $30,000 of stock to be accounted for $15,000 as of January 11, 1888, and $30,000 as of April 22, 1889.

(3.) For the damages suffered by the company by reason of the issue to the other stockholders of the Great Western Mining and Manufacturing Company by B. D. Harris and the other officers and directors of the company on January 18, 1888, of three hundred and fifty shares or $35,000 of stock, and on April 22, 1889, of seven hundred shares or $70,000 of stock without consideration, to determine which said damages and injury a reference should be had to a master.

(4.) For the dividends wrongfully paid out of capital stock between April, 1889, and July, 1892, as a joint and several liability of the directors and officers of the company so paying said dividends, and for the dividends paid B. H. Harris individually as a several liability of his estate.

And the cause having been duly considered;

It is ordered, adjudged and decreed,

1. That the complainant recover from Charles A. Harris, Henry H. Hollister and Sarah B. Harris, executors of the estate of B. D. Harris, deceased, the sum of fifteen thousand dollars (15,000), with interest from October 17, 1901, to the date of this decree, being the amount received by said B. D. Harris in his lifetime, and on or prior to January 11, 1890, from the funds of the Great Western Mining and Manufactruing Company, and out of the proceeds of the sale of $300,000 par value of
289 bonds issued by said corporation, bearing date of June 1st, 1889, and that said defendants Charles A. Harris, Henry H. *Hollister and Sarah B. Harris*, as executors of the estate of B. D. Harris, deceased, are decreed to pay to the complainant herein the said sum of fifteen thousand dollars with interest thereon from the 17th day of October, 1901, to the 17th day of March, 1902, the date of this decree, in the sum of $375, the whole amounting to fifteen thousand three hundred seventy-five dollars, out of the goods, chattels and estate in their hands belonging to the estate of said B. D. Harris, within thirty days, and that in default of such payment execution do issue against the goods, chattels and estate which were of said B. D. Harris, in the hands of said defendants executors as aforesaid.

2. That as to other claims made by the complainant as hereinbefore set forth the same be and are hereby dismissed.

3. That the defendants herein pay the costs in this action hereafter to be taxed within thirty days from the date thereof out of the goods, chattels and estate of said B. D. Harris, and that in default of such payment execution do issue against said goods, chattels in the hands of said executors as aforesaid.

Done in court this 17th day of March, 1902, a day in said term.

HOYT H. WHEELER, *Judge.*

And afterward, and on the 11th day of June, A. D. 1902, the orator filed its petition for appeal, assignment of errors and order allowing appeal upon approval of bond on appeal, and on the 4th day of August, 1902, it filed its bond on appeal duly approved by the court; which said petition for appeal, assignment of errors, order allowing appeal and bond on appeal are in the words and figures following:

290 United States Circuit Court, District of Vermont.

THE GREAT WESTERN MINING AND MANUFACTURING Company, by L. C. Black, Receiver, Complainant,
vs.
CHARLES A. HARRIS, HENRY D. HOLLISTER, and Sarah B. Harris, as Executors of the Last Will and Testament of B. D. Harris, Deceased, Defendant.
} Petition for an Appeal.

Now comes the complainant, The Great Western Mining and Manufacturing Company by L. C. Black, receiver, and prays the court to allow an appeal in the above entitled cause to the United States circut court of appeals in and for the second circuit, and presents herewith its assignments of errors and asks the court to fix the amount of the appeal bond.

And your petitioner will ever pray, &c.

THE GREAT WESTERN MINING AND MANUFACTURING CO.,
By L. C. BLACK, *Receiver*.
By DILLINGHAM, HUSE & HOWLAND, AND CLEVELAND & BOWLES, *Solicitors*.

291 United States Circuit Court, District of Vermont.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY, by L. C. Black, Receiver,
vs.
CHARLES A. HARRIS ET ALS., Executors, &c.

Assignment of Errors.

The complainant, The Great Western Mining and Manufacturing Company, by L. C. Black, receiver, presents the following assignment of errors in the above entitled cause, and assigns as error that:

1st. The court erred in decreeing that the complainant recovered only the sum of $15,000, with interest from October 17, 1901, and in dismissing the claim of complainant and to recover the sum of $75,000, with interest from January 11, 1890, as a liability of the defendants, as executor- of the estate of B. D. Harris, as director and officer of said company for said sum of $75,000, being funds of the Great Western Mining and Manufacturing —, misappropriated by said *by* B. D. Harris *as* lifetime by himself and other directors and officers of said company to himself and said other officers and directors.

2d. The court — in failing to decree as claimed by complainant that the complainant was entitled to recover on the $15,000 de-
292 creed by the court to be recovered by the complainant from the defendants as received by B. D. Harris in his lifetime, on and prior to January 11, 1890, from the funds of said company, and out of the proceeds of the bonds mentioned in said decree, interest from the date of the receipt of the same, the said $15,000, by said B. D. Harris, to wit, interest from January 11, 1890, and in decreeing that complainant was entitled to interest on said $15,000 only from October 17, 1901.

3d. The court erred in not decreeing, as claimed by complainant, that the defendant and the estate of said B. D. Harris was liable for $45,000 on account of the issue to said B. D. Harris is without consideration on January 11, 1888, of one hundred and fifty shares or $15,000 of stock, and on April 22, 1889, of 300 shares or $30,000 of stock to be accounted for $15,000, as of January 11, 1888, and $30,000 as of April 22, 1889, and in dismissing said claim.

4th. The court erred in not decreeing a reference to a master to determine or in not decreeing and determining the damages suffered by complainant by reason of said company, other than B. D. Harris, by B. D. Harris, and the other officers thereof and directors on January 11, 1888, of 350 shares or $35,000 of stock, and on April 22, 1889, of 700 — or $70,000 of stock, without consideration, as claimed by complainant, and in dismissing said claim.

5th. The court erred in not decreeing that said defendants and estate of B. D. Harris was liable, as claimed by complainant, for dividends wrongfully paid out of capital stock between April, 1889, and July, 1892, by the officers and directors so paying said dividends, including said B. D. Harris, and for dividends paid B. D. Harris individually during said period and in dismissing said claim.

293 6th. The court erred in not allowing interest on funds of complainants wrongfully received by B. D. Harris from the date of the receipt of the same.

7th. The court erred in dismissing the claims of the complainant, as stated in the decree, otherwise than as allowed by said decree.

The complainant assigns the above and foregoing as errors in the decree heretofore entered herein by said court.

DILLINGHAM, HUSE & HOWLAND,
CLEVELAND & BOWLEY,
Solicitors for Complainant.

U. S. Circuit Court, District of Vermont.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY, L. C. Black, Receiver,
vs.
CHAS. A. HARRIS ET AL., Receivers, &c.

Order.

This day came the complainant The Great Western Mining and Manufacturing Company, by L. C. Black, receiver, and presented its petition for appeal and assignments of error in the above entitled cause, and prayed an appeal to the United States circuit court of appeals in and for the second circuit, and that the court fix the
294 amount of the appeal bond, and the court having examined the same doth

Order, that said appeal be and the same is hereby allowed; that the amount of the appeal bond be fixed at $250, and that said assignments of error be fixed.

June 11, 1902.—Appeal allowed, citation to issue as presentation and approval of bond.

HOYT H. WHEELER, *Judge.*

Know all men by these presents, that we, The Great Western Mining and Manufacturing Company, by L. C Black, receiver, as principal, and American Fidelity Company, as sureties, are held and firmly bound unto Charles A. Harris, Henry H. Hollister and Sarah B. Harris, as executors under the last will and testament of *E.* D. Harris, deceased, in the full and just sum of two hundred fifty dollars, to be paid to the said Charles A. Harris, Henry H. Hollister and Sarah B. Harris, as executors aforesaid, their certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 23d day of July, in the year of our Lord one thousand nine hundred and two.

Whereas, lately, at a stated term of the United States circuit court for the district of Vermont, in a suit depending in said court between The Great Western Mining and Manufacturing Company, by L. C. Black, receiver, and Charles A. Harris, Henry H. Hollister and Sarah B. Harris, as executors of the last will and testament of B. D. Harris, deceased, a decree was rendered against the said The Great Western Mining and Manufacturing Company, by L. C. Black, receiver, and the said The Great Western Mining and Manufacturing Company, by L. C. Black, receiver, having obtained an appeal
295 and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation di-

rected to the said Charles A. Harris, Henry H. Hollister and Sarah B. Harris, as executors of the last will and testament of B. D. Harris, deceased, citing and admonishing them to be and appear at a session of the United States circuit court of appeals for the second circuit, to be holden at the city of New York, in said circuit, on the first day of September next.

Now, the condition of the above obligation is such, that if the said The Great Western Mining and Manufacturing Company, by L. C. Black, receiver, shall prosecute said appeal to effect, and answer all damages and costs, if it fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY,
By L. C. BLACK, *Its Receiver.*
AMERICAN FIDELITY COMPANY,
By JAMES W. BROCK, *President.*

Sealed and delivered in presence of—
WILLIAM TROMLEY.

Attest:
H. W. VINCENT, *Secretary.*

Approved by:
HOYT H. WHEELER,
[L. S.] *Judge U. S. Circuit Court.*

And afterwards, and on the 8th day of August, A. D. 1890, filed entry granting leave to file additional assignment of errors, order approving bond on appeal and order for issuing of citation; all of which are in the words and figures following:

296 United States Circuit Court, District of Vermont.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY, by L. C. Black, Receiver, Complainant,
vs.
CHARLES A. HARRIS ET AL., Executors, &c., Defendants.

Entry.

This day came the Great Western Mining and Manufacturing Company, by L. C. Black, receiver, and presented to the court additional assignments of error, and asked leave of the court to file the same, which was accordingly granted. And thereupon in pursuance of petition for appeal heretofore filed herein, and the order of the court allowing the same and fixing the bond in the sum of $250,

which order is in all respects ratified and confirmed, and said appeal allowed as prayed for,

It is further ordered, that a citation to the parties hereto be issued in due form on the perfecting of said appeal, by the giving of the bond as heretofore fixed. And thereupon came the said The Great Western Mining and Manufacturing Company, by L. C. Black, its receiver, and presented its bond and surety, and the court having examined the same and found said bond to be in all respects regular and in accordance with law,

It is ordered, that said sum be, and it is hereby approved
297 as the bond of said The Great Western Mining and Manufacturing Company, by L. C. Black, receiver, and that a citation issue in due form in accordance with law.

Done this 2d day of August, A. D. 1902.

HOYT H. WHEELER, *Judge.*

And afterwards, and on the 8th day of August, A. D. 1902, additional assignments of error were filed in said cause; which said additional assignments of error are in the words and figures following:

United States Circuit Court, District of Vermont.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY, by L. C. Black, Receiver, Complainant,
vs.
CHARLES A. HARRIS ET AL., Executors, &c., Defendants.

Additional Assignment of Error.

The complainant, The Great Western Mining and Manufacturing Company, by L. C. Black, receiver, presents and makes the following additional assignment of errors, in addition to these heretofore filed in the above entitled cause, and says that in the record and proceedings there are the following errors, to wit:

First. The court erred in not decreeing that the complain-
298 ant was entitled to recover $22,500, with interest from January 11, 1890, being the amount received by said B. D. Harris in his lifetime, and on or prior to January 11, 1890, from the funds of the Great Western Mining and Manufacturing Company, and out of the proceeds of the sale of $300,000 par value of bonds issued by said corporation, and bearing date of June 1, 1889, and in decreeing that complainant was entitled to recover only $15,000 of such sum, with interest from October 17, 1901.

Second. The court erred in not decreeing that complainant was entitled to recover $52,500, with interest from January 11, 1890, being the amount paid over by said B. D. Harris and the other officers and directors of the Great Western Mining and Manufacturing Company in pursuance of the plan and combination of said

B. D. Harris and said officers and directors to said officers and directors other than B. D. Harris on or prior to January 11, 1890, from the funds of said company and out of the proceeds of the sale of $300,000 par value of bonds issued by said corporation and bearing date of June 1, 1889.

CLEVELAND & BOWLER,
Solicitors for Complainant.

And afterwards, and on the same 8th day of August, A. D. 1902 a stipulation of counsel was filed in said cause as to use of original exhibits upon hearing on appeal in the United States circuit court of appeals, which said stipulation is in the words and figures following:

299 United States Circuit Court, District of Vermont.

GREAT WESTERN MINING AND MANUFACTURING COMPANY, &c.,
vs.
CHARLES A. HARRIS ET AL.

It is stipulated between the parties hereto that the original exhibits, which are the books of account of the Great Western Mining and Manufacturing Company, attached to the evidence taken before the commissioner herein, need not be copied into the transcript of the record, but may be produced and used so far as relevant and desired by either party at any hearing on appeal of the cause with the same force and effect as if included in the transcript and printed in the record.

WATERMAN & MARTIN,
Solicitors for Charles A. Harris and Others, Defendants.
CLEVELAND & BOWLER,
DILLINGHAM, HUSE & HOWLAND,
Solicitors for Complainant.

And afterwards, on the 15th day of August, A. D. 1902, the citation issued in said cause was returned into court duly served, which said citation is hereto annexed:

300 UNITED STATES OF AMERICA, *Second Judicial Circuit*, } *ss*:

United States Circuit Court of Appeals for the Second Circuit.

To Charles A. Harris, Henry D. Hollister, and Sarah B. Harris, as executors of the last will and testament of B. D. Harris, deceased Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the second cir-

cuit, to be holden at the city of New York, in said circuit, on the first day of September next, pursuant to a petition for an appeal, filed in the clerk's office of the circuit court of the United States for the district of Vermont, wherein The Great Western Mining and Manufacturing Company, by L. C. Black, receiver, is complainant and you are defendants, to show cause, if any there be, why the decree rendered against the said complainant in said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 2d day of August, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America the one hundred and twenty-sixth.

HOYT H. WHEELER, *Judge.*

UNITED STATES OF AMERICA, *District of Vermont,* } ss:

At Brattleboro, in said district, this 9th day of August, A. D. 1902, I certify that I have this day served the within citation on
301 Waterman & Martin, solicitors for the defendant-, by showing to them the same, and leaving with E. L. Waterman, a member of the firm of Waterman & Martin, a copy thereof, with this my return thereon endorsed. And on the same day I made personal service of this citation upon Charles A. Harris, by showing to him the same and leaving with him a copy thereof, with this my return thereon endorsed.

And on the 27th day of August, 1902, I made further service of the within citation on the within named defendant Sarah B. Harris, by leaving a true and attested copy thereof at the dwelling house and usual place of abode of said defendant with Nellie Griffin, the servant of said defendant, an adult person of sufficient discretion to receive the same, then a member of and a resident in the family of said defendant Sarah B. Harris, with this my return thereon endorsed.

I was unable to make service upon Henry D. Hollister, as he is without my district.

Attest:

FRED A. FIELD,
U. S. Marshal,
By —— ——, *Deputy.*

Travel 77 miles a. .06 Aug. 9th	$4 62
2 services	4 00
Travel 77 miles a. .06 Aug. 27th	4 62
1 service	2 00
	$15 24

(Endorsed:) United States circuit court, district of Vermont.—Great Western Mining and Manufacturing Co. *vs.* Chas. A. Harris *et al.*, executors, &c.—Citation.—Return served August 15, 1902.—Geo. E. Johnson, clerk.

302 And afterwards, on the 13th day of September A. D. 1902, the petition for appeal of Chas. A. Harris, executors *et als.*, defendants, assignment of errors and bond on appeal not to act as supersedeas duly approved by the court were filed in said cause, which said petition, assignment of errors and bond on appeal are in the words and figures following:

United States Circuit Court, Southern District of New York.

THE GREAT WESTERN MINING AND MANUFACTURING Company, by L. C. Black, Its Receiver, Plaintiff,
vs.
CHAS. A. HARRIS, as Executor, *et al.*, of B. D. Harris, Deceased, Defendant-. } In Equity.

The above-named defendants, as executor- *et al.*, considering themselves aggrieved by the decree entered herein March 17, 1902, directing the payment of $15,000 to plaintiff, do hereby appeal from said decree to the United States circuit court of appeals *from* the second circuit and do pray that this appeal may be allowed and a citation granted, directed to the above named plaintiff, commanding him as receiver, to appear before the said United States circuit court of appeals for the second circuit, to receive what may pertain to justice to be done in the premises, and that a transcript of the
303 record, proceedings and papers upon which said decree or order was made, duly authenticated, may be sent unless already sent, to said United States circuit court of appeals for the second circuit.

E. L. WATERMAN,
Solicitor for Defendant-.

The above appeal is allowed as prayed for without operation as a supersedeas.

HOYT H. WHEELER, *Judge.*

United States Circuit Court, Southern District of New York.

THE GREAT WESTERN MINING AND MANUFACTURING Company, by L. C. Black, Its Receiver, Plaintiff,
vs.
CHARLES A. HARRIS, as Executor, *et al.*, of D. B. Harris, Deceased, Defendant. } In Equity.

Assignment of Errors.

Now comes the defendant by his solicitors, and says, that in the record and proceedings of said court in the above entitled cause, and in the decree made on March 17, 1892, there is manifest error, and for such error the said defendant assigns the following:

304 1. The circuit court erred in holding that defendants as executors and executrix are liable to plaintiff for any sum or sums whatever.

2. The circuit court erred in its judgment directing that plaintiff recover from the executors, &c., of B. D. Harris, deceased, the sum of $15,000, with interest.

3. Said court erred in finding that such amount was received by said Harris in his lifetime prior to January 11, 1890, from the funds of the Great Western Mining and Manufacturing Company, and out of the proceeds of the sale of $300,000, par value of the bonds issued by said company bearing date June 1, 1889, upon the alleged consideration of the transfer by said Harris to the purchasers of said bonds of 300 shares of stock of said company, equal in amount to the stock issued to said B. D. Harris, as of date of April 22, 1889.

4. The circuit court erred in its judgment directing that defendant pay any sum or any such sum to plaintiff on account of any such obligation to or claim of plaintiff, and also in granting such judgment except as under the laws of the State of Vermont in regard to probate court, and applicable to this cause.

E. L. WATERMAN,
Solicitor for Defendant.

305 United States Circuit Court, Second Circuit.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY, by L. C. Black, Its Receiver,
vs.
CHARLES A. HARRIS, as Executor, ET AL.

Bond.

Know all men by these presents that the United States Fidelity and Guaranty Company is held and firmly bound unto the above

named plaintiff, The Great Western Mining and Manufacturing Company, or unto L. C. Black, its receiver, in the sum of two hundred and fifty dollars ($250) to be paid to the said plaintiff, for the payment of which well and truly to be made the said United States Fidelity and Guaranty Company doth hereby bind itself and its successors firmly by these presents.

Sealed with its seal and dated the eleventh day of September, in the year of our Lord one thousand nine hundred and two.

Whereas, the above named defendants, executors and executrix of B. D. Harris, deceased, have prosecuted an appeal to the circuit court of appeals of the United States in and for the second circuit, to reverse the decree rendered in the above entitled suit by the circuit court of the United States for the district of Vermont,
306 which awards the plaintiff the sum of fifteen thousand dollars ($15,000) and interest.

Now, therefore, the condition of this obligation is such that if the above named defendants, executors and executrix shall prosecute said appeal to effect and answer all damages and costs, if they fail to make said appeal good, then the obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Dated New York, September 11, 1902.

THE UNITED STATES FIDELITY
AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN,
Manager.

Attest:

G. TERRY SINCLAIR,
Attorney in Fact.

Affidavit, Acknowledgment, and Justification by the United States Fidelity and Guaranty Company.

STATE OF NEW YORK. }
County of New York, } ss:

Before me personally came Sylvester J. O'Sullivan, known to me to be the manager of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Chas. A. Harris, as executor *et al.*, as surety thereon, who being by me duly sworn, deposes and says: That he resides in the city of New York, State of New York, and that he is the manager of said The United States Fidelity and Guaranty Company and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions
307 of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal

affixed to the annexed bond of Charles A. Harris as executor *et al.*, is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name hereto by like order and authority as manager of said company; and that he is acquainted with G. Terry Sinclair, and knows him to be the attorney in fact of said company; and that the signature of said G. Terry Sinclair, subscribed to said bond is in the genuine handwriting of said G. Terry Sinclair, and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unincumbered and liable to execution, exceed its claims, debts and liabilities of every nature whatsoever, by more than the sum of one million dollars ($1,000,000.)

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 11th day of September, 1902.

JAMES P. WRIGHT,
Trust Officer, Notary Public, Kings Co.

Certificate filed in New York Co.

Form 1.

STATE OF NEW YORK, }
County of New York, } *ss.:*

I, Thomas L. Hamilton, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify that James P. Wright, whose name is subscribed to the certificate of the proof or acknowledgement of the annexed instrument and thereon written, was at
308 the time of taking such proof or acknowledgement, a notary public in and for the county of New York, dwelling in the said county, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgement is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 12th day of September, 1902.

[L. S.] THOS. L. HAMILTON, *Clerk.*

Approved September 13, 1902, not to operate as supersedeas.

HOYT H. WHEELER, *Judge.*

And afterwards, and on the 13th day of September, A. D. 1902, a citation was duly issued, which was returned into court duly served on the 27th day of September, A. D. 1902, which said citation is hereto annexed.

By the Honorable Hoyt H. Wheeler, one of the judges of the circuit court of the United States for the district of Vermont, in the second circuit, to the Great Western Mining and Manufacturing Company, or to L. C. Black, its receiver, Greeting:

You are hereby cited and admonished to be and appear before a United States circuit court of appeals for the second circuit, to be holden at the borough of Manhattan, in the city of New York, in the district and circuit above named, on the 11th day of October, 1902, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Vermont, wherein, Chas. A. Harris, as executor *et al.*, are appellants, and you are ap-
309 pellee, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at Brattleboro, in the State of Vermont, in the district and circuit above named, the 13th day of September, in the year of our Lord one thousand nine hundred and two, and of the Independence of these United States the one hundred and twenty-sixth.

HOYT H. WHEELER,
Judge of the Circuit Court of the United States for the District of Vermont, in the Second Circuit.

UNITED STATES OF AMERICA, *District of Vermont,* } *ss:*

At Montpelier, in said district, this 22d day of September, 1902, I served this citation on the Great Western Mining and Manufacturing Co., by L. C. Black, its receiver, by delivering a true and attested copy thereof to W. P. Dillingham, of the firm of Dillingham, Huse & Howland, their attorneys, with this my return hereon thereon endorsed.

Attest:

FRED A. FIELD,
U. S. Marshal,
By LUKE PARISH,
Deputy U. S. Marshal.

Service of citation.....	$2 00
Paid mileage to Montpelier and return, 64 miles at 2¼ cts. per mile.....	1 44

(Endorsed:) Marshal's No. 190.—United States circuit court of appeals for the second circuit, dist. of Vermont.—The Great
310 Western Mining & Manufacturing Co., by L. C. Black, its receiver, *vs.* Chas. A. Harris, as executor *et al.*—Original citation to plaintiffs.—E. Waterman, solicitor, Brattleboro, Vt.—Returned served September 27, 1902.—Geo. E. Johnson, clerk.

And afterwards, and on the 6th day of November, A. D. 1902, a stipulation of respective counsel as to use of original exhibits upon hearing on appeal in said cause was duly filed; which said stipulation is in the words and figures following:

United States Circuit Court, District of Vermont.

GREAT WESTERN MINING AND MANUFACTURING CO., &C.,
v.
CHARLES A. HARRIS ET AL.

It is stipulated between the parties hereto that the original exhibits contained in the report of H. H. Grant, commissioner in the above entitled cause, which are contained in the bound volume making up the report called the report of H. H. Grant, filed May 23, 1901, with George E. Johnson, clerk United States circuit court, need not be copied into the transcript of the record, but may be produced and used so far as relevant and desired by either party at any hearing on appeal of the cause with the same force and effect as if included in the transcript and printed in the record.

E. L. WATERMAN,
Solicitor for Defendants.
HARLAN CLEVELAND,
Solicitor for Complainant.

311 UNITED STATES OF AMERICA,
District of Vermont.

I, Geo. E. Johnson, clerk of the circuit court of the United States of America for the district of Vermont, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 350, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Great Western Mining and Manufacturing Company, appellant, against Charles A. Harris *et als.*, executors, appellees, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of said court to be hereunto affixed, at the city of Burlington, in said district of Vermont, in the second circuit, this 18th day of November, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-seventh.

[SEAL.] GEO. E. JOHNSON, *Clerk.*

a United States Circuit Court of Appeals for the Second Circuit.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY, L. C. Black, Receiver, Complainant-Appellant,
vs.
CHARLES A. HARRIS ET AL., Executors, etc., Defendants-Appellants.

EXHIBITS.

Appeals from the circuit court of the United States for the district of Vermont.

To be used under stipulation.

1 United States Circuit Court of Appeals for the Second Circuit.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY, L. C. Black, Receiver, Complainant-Appellant,
vs.
CHARLES A. HARRIS ET AL., Executors, etc., Defendants-Appellants.

EXHIBITS.

Appeals from the circuit court of the United States for the District of Vermont.

EXHIBIT "2."

NOVEMBER 15, 1883.

The property of the Great Western Mining and Manufacturing Company, situated in Lawrence county, Ky., consists of about 6,000 acres of lands in full, together with improvements, being a store, dwellings, incline, tipple, etc., and cost about $250,000.00, represented by a capital stock of *two thousand shares* of *one hundred* dollars each..... $200,000.00

2 The stockholders are:

	Shares.	
B. D. Harris, Brattleboro, Vt.	(600)	$60,000
G. D. Harris, Keene, N. H.	(600)	60,000
G. W. Carlisle, Cincinnati, O.	(300)	30,000
John Carlisle, Cincinnati, O.	(375)	37,500
G. S. Richardson, Ashland, Ky.	(50)	5,000
L. Hinsdale, Cincinnati, O.	(25)	2,500
Jas. C. Holden, New York	(50)	5,000
	2,000	$200,000.00

Also cost of improvements, for opening mines, building houses, tipple, etc., being indebtedness..... $53,845.53

1883.

The indebtedness of the Great Western Mining and Manufacturing Company, on November 15, 1883, was as follows:

For amount of advances made by Mr. John Carlisle, prior to March 1, 1883, on account of improvements to the mining company's property, for which notes were given to him by the mining company in settlement:

One note, dated March 1, 1883, at three years, 6 per cent. interest	$26,194.42	
One note, dated March 1, 1883, at three years, 6 per cent. interest	2,878.84	
		$29,073.26
For amount of improvements made prior to May 14, 1883, for which our note was given to Mr. John Carlisle, and discounted through the Union national bank, of Cincinnati, O.; the same came due Sept. 17, 1883, and was paid by Mr. John Carlisle		7,000.00
3 Notes to Shoenberger, Bowler, Anderson, which were taken up by Mr. Carlisle, and his personal notes given instead:		
R. B. Bowler, due July 5, 1884	$2,743.79	
S. K. Shoenberger, Sept. 26, 1884	2,091.54	
L. Anderson, due July 8, 1884	2,064.65	
R. B. Bowler, due Oct. 6, 1884	2,743.79	
L. Anderson, due Oct. 8, 1884	2,064.65	
S. K. Shoenberger, Oct. 18, 1884	2,091.54	
R. B. Bowler, due Jan. 4, 1885	2,743.79	
L. Anderson, Jan. 8, 1885	2,064.65	
S. K. Shoenberger, Jan. 17, 1885	2,091.54	
		$20,699.94
Personal account due at Ashland	$7,755.07	$56,773.20
Freight due Chattaroi railway	4,874.50	
		12,629.57
		$69,402.77
Less personal account due company	$12,781.16	
Cash on hand	2,776.08	
		15,557.24
Net indebtedness		$53,845.53

In January, 1884, resolution passed by board to issue company's bond of $1,000 each, interest, 7 per cent., for $60,000.00.

1884.

On Dec. 31, 1884, the indebtedness was as follows:

Notes to John Carlisle	$26,194.42	
Notes to John Carlisle	2,878.84	
Notes to John Carlisle	7,000.00	
Notes to Shoenberger, Bowler and Anderson	20,699.94	
Same as November 15, 1883		$56,773.20
Amount increased during the year:		
Notes to Geo. Whitcomb, for mining machines	$3,918.00	
Notes to John Meese & Son for flats	650.00	
Notes to Oliver Bros. & Phillips	670.78	
Notes to Warren Burchard & Co	125.00	
4 Note to Norwald Iron Works	750.00	
Notes to Post & Co	1,121.59	
		$7,235.17
Notes to Cheshire Savings Institution of Keene N. H., endorsed by the directors and secured by 15 first mortgage bonds of the company's, dated July 1, 1884, for		15,000.00
Total bills payable		$78,008.37

Advances by Mr. John Carlisle during 1884	$9,854.29	
Personal accounts due by company	23,703.06	
		33,557.35
		$112,565.72
Less personal accounts due company	12,796.93	
Cash on hand	410.83	
		13,207.76
Net indebtedness, Dec. 31, 1884		$99,357.96
The amount of net earnings for 1884	$2,669.34	
Received from note of July 1, 1884	15,000.00	
Received from sale of 22 bonds	22,000.00	
Received from John Carlisle, advances	9,854.29	
	$49,523.63	
Paid out of construction, opening mines, building houses, tracks, etc.	45,254.10	
Balance applied to construction for 1885	$4,269.53	

5 1885.

On Dec. 31, 1885, the indebtedness was:

Note to John Carlisle	$26,194.42	
Note to John Carlisle	2,878.84	
Interest for 32 months at 6 per cent. on the above notes	4,651.71	
New notes given, including interest for		$33,724.97
Note to John Carlisle		7,000.00
Note to Cheshire Savings Institution		15,000.00
Note to O. C. Phelps		5,000.00
Note to Boyd for barges		7,117.72
Note to Whitcomb		2,742.60
Note to Geo. S. Richardson, store		2,153.80
Note to C. H. Rockwell, for store		2,498.34
Note to sundry parties		615.32
Total bills payable		$75,852.75
Advance by Jno. Carlisle in 1884	$9,854.29	
Advance by Jno. Carlisle in 1885	34,732.14	
		44,586.43
		$120,439.18
Amount personal account due company, less than personal account owed by company		872.43
Net liabilities due Dec. 31, 1885		$121,311.61
Balance from 1884	$4,269.53	
Rec'd net earnings for 1885	4,503.19	
Rec'd from note to O. G. Phelps	5,000.00	
Rec'd from bonds sold	10,000.00	
Rec'd from John Carlisle, advances, 1885	34,732.14	
		$58,504.86
Applied to construction, house improvements	$21,598.14	
Construction of barges	11,598.09	
6 Dividends on stock	4,000.00	
Int. paid on bonds and notes	3,490.00	
Notes paid and interest	8,745.89	
Interest to Shoenberger, Bowler and Anderson	1,122.29	
		50,554.41
Balance to construction for 1886		$7,950.45

1886.

The indebtedness was:

Notes to John Carlisle		$33,724.97
Note to John Carlisle		7,000.00
Note to Cheshire Savings Institution		15,000.00
Note to O. C. Phelps		5,000.00
Note to Geo. Whitcomb		2,350.80
Note to G. S. Richardson		1,998.34
Note to Boyd, etc.		3,064.68
		$67,238.79
Advanced by Jno. Carlisle in 1884	$9,854.29	
Advanced by Jno. Carlisle in 1885	34,732.14	
Advanced by Jno. Carlisle in 1886	4,504.63	
		$49,091.06
		$117,229.85
Less personal accounts due the company over and above accounts owing by company		6,247.37
Net indebtedness in 1886		$110,982.48
Balance from 1885	$7,950.45	
Net earnings for 1886	6,021.81	
Advanced by Jno. Carlisle in 1886	4,504.63	
		$18,476.89
Applied to		
Construction	$5,889.35	
Construction ice breaks	1,298.75	
Construction barges	1,753.15	
Interest paid on bonds and notes	3,490.00	
Notes paid off amounting to	3,632.20	
		16,063.45
Balance to 1887		$2,413.44

7

1887.

Dec. 31, 1887, the indebtedness was:

Notes to John Carlisle	$33,724.97	
Interest	3,046.99	
		$36,771.96
Note to John Carlisle		7,000.00
Note to Cheshire Savings Institution		15,000.00
Note to O. C. Phelps		5,000.00
Note to Geo. Whitcomb		2,742.60
Note to Geo. Richardson		1,575.30
Note to John Meese & Son		650.00
Total bills payable		$68,739.86
Advanced by John Carlisle in 1884	$9,854.29	
Advanced by John Carlisle in 1885	34,732.14	
Advanced by John Carlisle in 1886	4,504.63	
	$49,091.06	
Less amount paid during 1887	11,543.29	
		$37,547.77
		$106,287.63
Net personal accounts due		1,602.61
Net indebtedness for 1887		$107,890.24

Balance from 1886	$2,413.44	
Net earnings for 1887	21,579.67	
Bills payable increased	600.11	
Personal accounts increased	4,644.66	
		$29,237.88
Applied to		
Construction	$13,410.67	
Construction of barges	1,300.00	
Paid interest on bonds and notes	3,490.00	
Paid John Carlisle	11,543.96	
		$29,744.63
Balance overpaid		$506.75

8 1888.

Dec. 31, 1888, the indebtedness was:

Notes to John Carlisle		$36,771.96
Notes to John Carlisle		7,000.00
Notes to Cheshire Savings Institution		15,000.00
Notes to O. C. Phelps		5,000.00
Notes to Geo. Whitcomb		2,742.60
Notes to Geo. S. Richardson		775.30
Total bills payable		$67,289.86
Advanced by John Carlisle in 1884	$9,854.29	
Advanced by John Carlisle in 1885	34,732.14	
Advanced by John Carlisle in 1886	4,504.63	
	$49,091.06	
Less amount paid in 1887 $11,542.29		
Less amount paid in 1888 12,479.55		
	24,021.84	
		25,069.22
		$92,362.08
Less personal accounts due company and cash		777.05
Net indebtedness for 1888		$91,585.03
Net earnings for 1888	$30,610.95	
		30,610.95
Applied to		
Construction on	$2,217.04	
Interest on bonds and notes	3,490.00	
Interest on notes to Jno. Carlisle, 1886	3,046.99	
Dividends	4,500.00	
Paid John Carlisle in 1888	12,479.55	
Paid personal accounts	2,399.66	
Paid notes off	1,450.00	
Amount overpaid in 1887	506.75	
		$30,089.99
Balance		$520.96

9 EXHIBIT "9."

NEW YORK, *Nov.* 10, 1887.

Called meeting of the directors of the Great Western Mining and Manufacturing Company.

Present: Messrs. B. D. Harris, G. D. Harris, J. C. Holden and John Carlisle.

The secretary and treasurer reported that the business at the mines was unusually good, and that owing to the long drouth and the unsurpassed facilities for supplying the market with the Peach Orchard coal by rail, from the company's mines, that the profits had largely increased, and the only thing lacking was sufficient capital to enable the company to increase the output enough to meet the demand. He also reported that a large amount had been expended this year for permanent improvements out of the earnings of the company—the total for the past three years amounting to over $50,000.

On motion of Mr. G. D. Harris, the president and secretary were authorized to call a meeting of the stockholders on January 11, at Cincinnati, for the purpose of voting on an increase of the capital stock to the amount of $50,000, to be divided *pro rata* among the stockholders, being the amount of net earnings expended in permanent improvements.

Adopted unanimously.

Adjourned.

B. D. HARRIS, *Pres't.*

JOHN CARLISLE, *Sec'y.*

EXHIBIT "10."

Office Gt. W. M. & M. Co.

CINCINNATI, *Jan.* 11, 1888.

In pursuance of a call made by the directors for a meeting of stockholders to be held this day at 10 a. m., for the purpose of voting on an increase of stock, there were present, Messrs. Richardson, L. Hinsdale, John Carlisle and G. W. Carlisle, and proxy from B. D. Harris and G. D. Harris, representing 1,990 shares out of 2,000 shares.

Mr. G. S. Richardson was called to the chair, and Mr. John Carlisle was chosen secretary.

10 On motion of Mr. G. W. Carlisle, the following preamble and resolution was adopted unanimously—1,990 shares voting:

"Whereas, there has been expended for permanent improvements and betterments, including barges, flats, opening of new mines, machinery, etc., during the past three years, the amount of $64,666.44, all of which sum has been furnished from the net earnings of this company;

"*Resolved*, That the stockholders being entitled to the amount, the president and secretary be authorized and directed to issue five hundred shares of stock of this company to be divided *pro rata* among the stockholders of this company as follows:

"To B. D. Harris	150 shares.
" G. D. Harris	150 shares.
" John Carlisle	110 shares.
" G. W. Carlisle	75 shares.
" Geo. S. Richardson	13 shares.
" James C. Holden	1 share.
" L. Hinsdale	1 share."

Also

"*Resolved*, That the directors be requested to resume the payment of cash dividends."

Adjourned.

GEO. S. RICHARDSON, *Ch'm'n.*

JOHN CARLISLE, *Sec'y.*

EXHIBIT "11."

Office Gt. W. M. & M. Co.

CINCINNATI, *Jan.* 11, 1888.

Immediately after the meeting of the stockholders adjourned, the directors were called together—

The vice-president in the chair.

The report of the action of the stockholders at the meeting to-day was submitted, and on motion approved, and the officers of this company were directed to issue said stock.

It was also voted to commence paying regular quarterly dividends in cash of three-fourths of one per cent. on the capital stock—said dividends to be computed from the net earnings of the quarters ending on the first days of April, July, October and January 11 of each year, and to be paid to the stockholders on or before the first days of the following months, until otherwise directed by a vote of the directors.

Adjourned.

GEO. S. RICHARDSON, *V.-P.*

JOHN CARLISLE, *Sec'y.*

EXHIBIT "12."

Office Gt. W. M. & M. Co.

CINCINNATI, *Jan.* 15, 1889.

Special meeting board of directors Gt. W. M. & M. Co.

Present: G. S. Richardson, V.-P.; L. Hinsdale, G. W. Carlisle and John Carlisle.

Vice-president in the chair, who reported that the business of the

company during the past year had been exceptionally good—the net earnings being about $30,600, out of a production of 70,000 tons of lump coal. On motion of G. W. Carlisle, it was

"*Resolved*, That hereafter, until further notice, a dividend of one per cent. for each three months be paid on the capital stock outstanding."

It appearing that the item of construction account shows over $150,000 having been paid for improvements and betterments, from the net earnings of the company, which amount properly belongs to the stockholders of this company, it was upon motion of Mr. Hinsdale,

"*Resolved*, That the attention of the stockholders at the next annual meeting be called to the fact of such appropriation of the net earnings, with a request that they instruct this board what action to take."

The secretary reported that the president and himself had conferred with eastern capitalists on the subject of additional capital for this company, who recommended the issuing of first mortgage bonds, which could be sold at about 80 cents on the dollar. Report received and committee continued.

Adjourned.

JOHN CARLISLE, *Sec'y*.

EXHIBIT "13."

Stockholders' Meeting.

The annual meeting of the stockholders of the Great West-
12 ern Mining and Manufacturing Company will be held at the office of the company in Ashland, Ky., Monday, April 22, 1899, at 12 o'clock m., for the purpose of electing seven directors and for transaction of other business.

JOHN CARLISLE, *Sec'y*.

Ashland, March 26, 1889.

Office of the Gt. W. M. & M. Co.

ASHLAND, KY., *Apr.* 22, 1889.

In pursuance of the above notice, the stockholders of the Gt. W. M. & M. Co. met this day at 10 a. m.

Mr. G. S. Richardson was chosen chairman, and John Carlisle secretary.

The entire number of 2,000 shares was represented either in person or by proxy.

The annual reports of the general manager and treasurer were read and ordered filed.

On motion, the meeting proceeded to elect seven directors to serve the ensuing year, or until their successors were elected and qualified.

B. D. Harris and Geo. W. Carlisle were appointed judges and tellers.

Certificate of Election.

We hereby certify that B. D. Harris, G. D. Harris, L. Hinsdale, James C. Holden, G. W. Carlisle, John Carlisle and Geo. S. Richardson have received 2,500 votes, the total number of shares issued, and they are hereby declared elected directors of the Great Western Mining and Manufacturing Company.

B. D. HARRIS, *Judge.*
G. W. CARLISLE, *Judge.*

The attention of the stockholders being called to the large amount of net earnings being used for construction and betterments, the following resolution was presented, and, after consideration, was adopted, to wit:

"Whereas, there have been expended for permanent improvements and betterments, including machinery, barges, flats, etc., during the years 1884, 1885, 1886, 1887 and 1888, more than one hundred and sixty thousand dollars ($160,000.00), all of which sum has been furnished from the net earnings of the company, and fairly belongs to the stockholders of the company; therefore,

13 "*Resolved*, That the directors of this company be, and hereby are, authorized and requested to direct the president and secretary of the company to issue one thousand shares of the capital stock of the company to be divided *pro rata* among the present stockholders of this company, as follows:

To B. D. Harris	300 shares
To G. D. Harris	300 shares
To John Carlisle	220 shares
To G. W. Carlisle	150 shares
To Geo. S. Richardson	26 shares
To James C. Holden	2 shares
To Loring Hinsdale	2 shares

The matter of negotiating a loan for the benefit of the company was also presented for consideration, and after some discussion, the following preamble and resolution were adopted, to-wit:

"Whereas, by the charter of the Great Western Mining and Manufacturing Company, said company is authorized to borrow money and to issue bonds therefor to be secured by a deed of trust or mortgage on the property of the company; and

"Whereas, it is now expedient and necessary to negotiate a loan for the purpose of more thoroughly developing and largely increasing the output of the mines at Peach Orchard; for the purpose of additional machinery and working plant; for the construction of buildings; and for the liquidation of the present indebtedness of the company; therefore,

"*Resolved*, by the stockholders of said Great Western Mining and Manufacturing Company, That the directors of said company be and hereby are authorized and requested to negotiate a loan of three

hundred thousand dollars ($300,000), and to issue bonds therefor, and to execute a proper legal deed of trust or mortgage of all the property of the company to secure said bonds and interest; said bonds to bear such interest and to be payable at such time and place as the directors may determine."

The meeting of the stockholders then adjourned.

JOHN CARLISLE, *Sec'y.*

14 EXHIBIT "14."

ASHLAND, KY., *Apr.* 22, 1889.

A meeting of the newly elected directors of the Great Western Mining and Manufacturing Company was held this day, immediately after the adjournment of the stockholders' meeting.

There were present: B. D. Harris, Geo. S. Richardson, G. W. Carlisle and John Carlisle; absent: G. D. Harris, J. C. Holden and Loring Hinsdale.

The directors present were duly sworn to faithfully discharge and perform the duties devolving upon them, according to law. B. D. Harris was elected president of the company; Geo. S. Richardson, vice-president, and John Carlisle, secretary and treasurer, to serve as such for the ensuing year.

The following preamble and resolutions were presented, and, after full consideration, were unanimously adopted, to-wit:

"Whereas, the Great Western Mining and Manufacturing Company of Kentucky has power under its charter to borrow money and issue bonds therefor, and secure payment of the same by the mortgage of all or any part of the property of the company; and

"Whereas, at a meeting of the stockholders of the said company, held on the 22d day of April, A. D. 1889, the directors were authorized and requested to negotiate a loan of three hundred thousand dollars ($300,000) and to issue bonds therefor, and to execute a deed of trust or mortgage to secure payment thereof, on all the property of said company; and

"Whereas, it is desirable to more thoroughly develop and to largely increase the output of the mines at Peach Orchard, and such development can not be secured without additional capital for the opening of new mines, for the purchase of additional machinery and working plant, and for the increase of terminal facilities: Therefore

"(1) *Resolved*, That this company will issue three hundred (300) mortgage bonds of the denomination of one thousand dollars ($1,000) each, to mature in twenty (20) years from June 1, 1889, and to bear interest at the rate of six per cent. per annum, payable semi-annually, at the office of the Mercantile Trust and Deposit Company of Baltimore, Md., on the first days of June and
15 December in each year; the said interest to be represented by coupons, or interest warrants, principal and interest to be payable in United States gold coin of present standard weight and fineness.

"(2) *Resolved*, That the payment of the three hundred bonds aforesaid as they respectively mature, and of the interest as it semi-annually becomes due and payable, shall be secured by a first mortgage or deed of trust, conveying to the Mercantile Trust and Deposit Company of Baltimore, Md., all the property, real, personal and mixed, of the Great Western Mining and Manufacturing Company, now owned and held, or that may hereafter be owned and acquired by said company, together with all its income, revenues and franchises, in trust for the owners and holders of the said bonds, and to secure the full and faithful performance of all and every one of the obligations embodied in said deed of trust.

"(3) *Resolved*, That said deed of trust shall provide for the creation of a sinking fund in 1894; and the appropriation to such sinking fund shall be, in each year thereafter, not less than ten thousand dollars ($10,000), and when the output shall exceed 300,000 tons of lump coal annually, an additional amount of one thousand dollars, ($1,000) for each 25,000 tons excess, which sinking fund shall be used in the purchase of said bonds, which shall at once be canceled by said trustee, and delivered to said Great Western Mining and Manufacturing Company; provided, however, if said bonds shall not be obtainable at not exceeding their par value, the said trustee may designate by lot which bonds shall be retired.

"(4) *Resolved*, That the said deed of trust shall provide especially against the creation of any further mortgage debt, during the life of the three hundred (300) first mortgage bonds aforesaid, except with the consent in writing thereto of at least two-thirds of the holders in value of the said first mortgage bonds.

"(5) *Resolved*, That the preparation of a bond and deed of trust, in conformity with the foregoing resolutions, shall be entrusted to John Carlisle, and that the same, when duly approved by B. D. Harris, president, shall be executed in proper form by the said B. D. Harris, as president, and the corporate seal of the company, duly attested by John Carlisle, the secretary thereof, attached thereto.

16 "(6) *Resolved*, That the president and secretary of the company shall arrange for the sale of the three hundred (300) bonds aforesaid, in their discretion, at the best price attainable, and the proceeds thereof shall be applied to the cancellation and retirement of sixty (60) first mortgage seven per cent. bonds, dated Jan. 1, 1884, now outstanding; also to the payment of all floating indebtedness incurred up to the date thereof, for material and construction, and the balance shall be used by the directors for the best interests of the company."

The following preamble and resolution were also presented and adopted to-wit:

"Whereas, at the annual meeting of the stockholders of this company, a resolution was adopted requesting the directors to issue additional capital stock of this company, to the amount of one [hundred] thousand dollars, to be divided *pro rata* among the present stockholders, and based upon the fact that during the last five years

more than one hundred and sixty thousand dollars ($160,000.00) of the net earnings of the company have been expended for permanent improvements and betterments, thereby adding that amount to the assets of the company, which belong to the stockholders of the company; therefore

"*Resolved*, That the president and secretary of this company are hereby directed to issue one thousand shares of the capital stock of the company to the present stockholders, in proportion to the amount of stock already owned by them respectively, and that they furnish certificates of such stock as follows:

"To B. D. Harris	300 shares
To G. D. Harris	300 shares
To John Carlisle	220 shares
To G. W. Carlisle	150 shares
To Geo. S. Richardson	26 shares
To James C. Holden	2 shares
To Loring Hinsdale	2 shares."

The president was directed to execute a deed in behalf of the company, conveying the schoolhouse built by the company, to the proper officers of the school district, in which said schoolhouse is situated.

17 Messrs. Richardson and John Carlisle were appointed a committee to adjust salaries of officers and employees of the company.

The board then adjourned.

JOHN CARLISLE, *Sec'y.*

EXHIBIT "15."

Register of Transfer Stock of the Great Western Mining and Manufacturing Co.

No. of certf.	No. of shares.	Issued to Residence.	Date.
1	30	John Carlisle, Cincinnati	Oct. 10, 1863
2	200	John Carlisle, Cincinnati	March 25, 1868
3	25	John Carlisle, Cincinnati	March 25, 1868
4	25	John Carlisle, Cincinnati	March 25, 1868
5	16	John Carlisle, Cincinnati	March 25, 1868

No. of shares transferred.	Transferred to	No. of cert.	No. of shares.	Date.
30	John Carlisle, Cincinnati	135	95	July 6, '91
100	John Carlisle, Cincinnati	136	100	July 6, '92
100	John Carlisle, Cincinnati	137	100	July 6, '92
25	Chas. H. Graham, Philadelphia, Pa.	122	25	Oct. 13, '90
25	John Carlisle, Cincinnati	135	95	July 6, '91
16	John Carlisle, Cincinnati	135	95	July 6, '91

No. of certf.	No. of shares.	Issued to Residence.	Date.
6	50	Geo. S. Richardson, Ashland, Ky	July 1, 1873
7	4	John Carlisle, Cincinnati	July 4, 1874
8	100	John Carlisle, Cincinnati	Nov. 10, 1883
9	25	John Carlisle, Cincinnati	Nov. 10, 1883
10	25	John Carlisle, Cincinnati	Nov. 10, 1883

No. of shares transferred.	Transferred to	No. of cert.	No. of shares.	Date.
4	John Carlisle, Cincinnati	135	95	July 6, '91
100	Elliott, Johnson & Co., Wilmington, Del.	47	125	June 5, '89
25	Elliott, Johnson & Co., Wilmington, Del.	47	125	June 5, '89
25	J. G. Kraft, Baltimore, Md.	48	25	June 6, '89

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No. of certf.	No. of shares.	Issued to Residence.	Date.
11	100	G. W. Carlisle, Cincinnati	Nov. 10, 1883
12	100	G. W. Carlisle, Cincinnati	Nov. 10, 1883
13	50	G. W. Carlisle, Cincinnati	Nov. 10, 1883
14	40	G. W. Carlisle, Cincinnati	Nov. 10, 1883
		No. of original shares, 50.	
15	5	L. Hinsdale, Cincinnati	Nov. 10, 1883

No. of shares transferred.	Transferred to	No. of cert.	No. of shares.	Date.
100	Jacob Tome	154	100	June 6, '93
15	W. W. Spence, Baltimore, Md.	68	15	June 22, '89
13	R. H. Charles, Baltimore, Md.	69	13	June 22, '89
3	E. T. Latimer, Wilmington, Del.	70	3	June 22, '89
19	Elliott, Johnson & Co., Wilmington, Del.	71	19	June 22, '89
15	Thomas Jackson, Wilmington, Del.	62	15	June 15, '89
15	Elliott, Johnson & Co., Wilmington, Del.	61	15	June 15, '89
10	Elliott, Johnson & Co., Wilmington, Del.	71	10	June 22, '89
5	Elliott, Johnson & Co., Wilmington, Del.	121	35	Oct. 13, '90

No. of certf.	No. of shares.	Issued to Residence.	Date.
16	100	B. D. Harris, Brattleboro	Nov. 18, 1883
17	100	B. D. Harris, Brattleboro	Nov. 18, 1883
18	100	B. D. Harris, Brattleboro	Nov. 18, 1883
19	100	B. D. Harris, Brattleboro	Nov. 18, 1883
20	100	G. D. Harris, Keene, N. H.	Nov. 18, 1883

No. of shares transferred.	Transferred to	No. of certf.	No. of shares.	Date.
100	Edgar W. Stoddard, Brattleboro, Vt.	142	400	Dec. 10, '92
100	Edgar W. Stoddard, Brattleboro, Vt.	142	400	Dec. 10, '92
100	Edgar W. Stoddard, Brattleboro, Vt.	142	400	Dec. 10, '92
100	Edgar W. Stoddard, Brattleboro, Vt.	142	400	Dec. 10, '92
100	Edgar W. Stoddard, Brattleboro, Vt.	148	200	Dec. 10, '92

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No. of certf.	No of shares.	Issued to Residence.	Date.
21	100	G. D. Harris, Keene, N. H.	Nov. 18, 1883
22	100	G. D. Harris, Keene, N. H.	Nov. 15, 1883
23	100	G. D. Harris, Keene, N. H.	Nov. 15, 1883
24	200	G. D. Harris, Keene, N. H.	Dec. 31, 1883
25	200	B. D. Harris, Brattleboro, Vt.	Dec. 31, 1883

No. of shares transferred.	Transferred to	No. of certf.	No. of shares.	Date.
100	Edgar W. Stoddard, Brattleboro, Vt.	143	200	Dec. 10, '92
100	Edgar W. Stoddard, Brattleboro, Vt.	144	200	Dec. 10, '92
100	Edgar W. Stoddard, Brattleboro, Vt.	144	200	Dec. 10, '92
200	Edgar W. Stoddard, Brattleboro, Vt.	145	200	Dec. 10, '92
200	Edgar W. Stoddard, Brattleboro, Vt.	141	200	Dec. 10, '92

No. of certf.	No. of shares.	Issued to	Residence.	Date.
36	150	B. B. Harris,	Brattleboro, Vt.	Jan. 14, 1888
27	150	G. D. Harris,	Keene, N. H	Jan. 14, 1888
28	5	Jas. C. Holden,	Madison, N. J.	Feb. 14, 1884
29	25	John Carlisle,	Cincinnati, O.	Jan. 14, 1888
30	30	John Carlisle,	Cincinnati, O.	Jan. 14, 1888

No. of shares transferred.	Transferred to	No. of cert.	No. of shares.	Date.
12	David B. Scott, New York	99	12	Dec. 9, '89
25	Jacob Tome, Port Deposit, Md.	92	25	Oct. 26, '89
8	S. M. Curtis, Newark, Del.	96	8	Dec. 7, '89
25	Elliott, Johnson & Co., Wilmington, Del.	93	25	Oct. 26, '89
7	Elliott, Johnson & Co., Wilmington, Del.	97	7	Dec. 9, '89
5	Elliott, Johnson & Co., Wilmington, Del.	94	5	Nov. 9, '89
13	Elliott, Johnson & Co., Wilmington, Del.	98	13	Dec. 9, '89
5	Est. Samuel Morris dec'd Chester, Chatham P. O., Penn.	95	5	Nov. 9, '89
20 50	John Carlisle, Cincinnati, O.	100	50	Dec. 9, '80
20	Elliott, Johnson & Co., Wilmington, Del.	108	20	Mar. 8, '90
70	Chas. Graham, Philadelphia, Pa.	107	125	Mar. 7, '90
20	Martin Lane, Baltimore, Md.	109	20	Mar. 8, '90
14	Martin Lane, Baltimore, Md.	120	10	Apr. 13, '90
30	Elliott, Johnson & Co., Wilmington, Del.	121	30	Apr. 13, '90
25	Elliott, Johnson & Co., Wilmington, Del.	49	25	June 7, '88
5	H. S. Platt, Baltimore, Md.	50	5	June 8, '89
5	Elliott, Johnson & Co., Wilmington, Del.	51	5	June 8, '89
2	W. E. Rybold, Delaware City, Del.	52	2	June 8, '89
3	Emma & Julia N. Clark, Delaware City, Del.	53	3	June 8, '89

No. of certf.	No. of shares.	Issued to	Residence.	Date.
31	25	John Carlisle,	Cincinnati, O.	Jan. 14, '88
32	15	John Carlisle,	Cincinnati, O.	Jan. 14, '88
33	12	John Carlisle,	Cincinnati, O.	Jan. 14, '88
34	10	John Carlisle,	Cincinnati, O.	Jan. 14, '88
35	10	John Carlisle,	Cincinnati, O.	Jan. 14, '88

No. of shares transferred.	Transferred to	No. of cert.	No. of shares.	Date.
25	W. A. Goodman, Cincinnati	63	25	June 15, '89
15	Elliott, Johnson & Co., Wilmington, Del.	55	15	June 8, '89
12	Elliott, Johnson & Co., Wilmington, Del.	56	12	June 12, '89
10	Rev. Geo. W. Du Bois, Keene Valley, N. Y.	54	10	June 8, '89
10	W. W. Spence, Baltimore, Md.	74	10	July 1, '89

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No. of certf.	No. of shares.	Issued to	Residence.	Date.
36	13	Geo. S. Richardson,	Ashland, Ky.	Jan. 14, '88
37	75	G. W. Carlisle,	Cincinnati, O.	Jan. 14, '88
38	150	G. W. Carlisle,	Cincinnati, O.	Apr. 22, '88
39	224	John Carlisle,	Cincinnati, O.	Apr. 22, '88
40	26	Geo. S. Richardson,	Ashland, Ky.	Apr. 22, '88

No. of shares transferred.	Transferred to	No. of certf.	No of shares.	Date.
13	S. A. Liebig, Baltimore, Md.	58	13	June 12, '89
75	Henry Du Pont, Wilmington, Del.	64	75	June 17, '89
45	James C. Holden, New York	83	45	June 11, '89
179	John Carlisle, Cincinnati	84	179	June 11, '89
3	H. W. Rankin	72	3	July 1, '89
15	S. M. Curtis, Newark, Del.	73	15	July 1, '89
8	William Fait, Baltimore, Md.	74	8	July 1, '89

No. of certf.	No. of shares.	Issued to	Residence.	Date.
41	200	B. D. Harris,	Brattleboro, Vt	Apr. 22, 1889
42	200	G. D. Harris,	Keene, N. H.	Apr. 22, 1889
43	50	G. D. Harris,	Keene, N. H.	Apr. 22, 1889
44	50	G. D. Harris,	Keene, N. H	Apr. 22, 1889
45	50	B. D. Harris,	Brattleboro, Vt	Apr. 22, 1889

No. of shares transferred.	Transferred to	No. of cert.	No. of shares.	Date.
10	Elliott, Johnson & Co., Wilmington, Del.	90	10	Sept. 7, '89
10	Rev. Geo. W. Du Bois, Keene Valley, N. Y.	90	10	Sept. 7, '89
125	Elliott, Johnson & Co., Wilmington, Del.	106	125	Mar. 7, '90
55	Chas. Graham, Philadelphia	107	125	Mar. 7, '90
34	Elliott, Johnson & Co., Wilmington, Del.	78	34	July 1, '89
15	Elliott, Johnson & Co., Wilmington, Del.	79	15	July 1, '89
22 15	Henry Lewis, Philadelphia	80	15	July 1, '89
3	Elizabeth T. Lattimer, Wilmington, Del.	81	3	July 1, '89
2	Elliott, Johnson & Co., Wilmington, Del.	82	2	July 1, '89
25	John G. Reading, Philadelphia	85	25	July 1, '89
25	Elliott, Johnson & Co., Wilmington, Del.	86	25	July 1, '89
37	Elliott, Johnson & Co., Wilmington, Del.	87	37	July 1, '89
38	John G. Reading, Philadelphia	88	38	July 1, '89
6	John Carlisle, Cincinnati	89	6	July 1, '89
25	Geo. Eakins, Philadelphia	65	25	June 22, '89
25	Elliott, Johnson & Co., Wilmington, Del.	66	25	June 22, '89
25	Elliott, Johnson & Co., Wilmington, Del.	76	25	July 1, '89
25	Samuel Bancroft, Jr.	77	25	July 1, '89
50	Henry Du Pont, Wilmington, Del.	64	50	June 17, '89

No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from.	No. of original certf.	No. of original shares.
46	50	B. D. Harris,	Brattleboro, Vt.	April 22, 1889.			
47	125	Elliott, Johnson & Co.,	Wilmington, Del.	June 5, 1889.	John Carlisle	89	109
48	25	J. B. Kraft,	Baltimore, Md.	June 6, 1889.	John Carlisle	10	25
49	25	Elliott, Johnson & Co.,	Wilmington, Del.	June 7, 1889.	John Carlisle	29	25
50	5	H. S. Platt,	Baltimore, Md.	June 8, 1889.	John Carlisle	30	5

No. of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
25	Jacob Tome,	Port Deposit, Md.	59	25	June 14, 1889.
25	Elliott, Johnson & Co.,	Wilmington, Del.	60	25	June 14, 1889
125	A. S. Elliott,	Wilmington, Del.	110	383	April 7, 1890
25	A. S. Elliott,	Wilmington, Del.	110	383	April 7, 1890

No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from.	No. of original certf.	No. of original shares.
51	5	Elliott, Johnson & Co.,	Wilmington, Del.	June 8, 1889.	John Carlisle	30	15
52	2	W. E. Rybold,	Delaware City, Del.	June 8, 1889.	John Carlisle	30	15
53	3	Emma & Julia N. Clark,	Delaware City, Del.	June 8, 1889.	John Carlisle	30	15
54	10	Rev. George W. Du Bois,	Keene Valley, N. Y.	June 8, 1889.	John Carlisle	34	10
55	15	Elliott, Johnson & Co.,	Wilmington, Del.	June 8, 1889.	John Carlisle	32	15

No. of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
15	Henry P. Scott,	Wilmington, Del.	111	256	April 7, 1890
7	Geo. W. Du Bois,	Keene Valley, N. Y.	123	7	Oct. 18, 1890
3	Elliott, Johnson & Co.,	Wilmington, Del.	124	3	Oct. 18, 1890
15	A. S. Elliott,	Wilmington, Del.	110	383	April 7, 1890

No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from.	No. of original certf.	No. of original shares.
56	12	Elliott, Johnson & Co., Wilmington, Del		June 18, 1889.	John Carlisle	33	12
57	..	Error void		June 12, 1889.			
58	13	G. A. Liebig, Baltimore, Md		June 12, 1889.	Geo. S. Richardson	36	13
59	25	Jacob Tome, Port Deposit, Md		June 14, 1889.	B. D. Harris	46	50
60	25	Elliott, Johnson & Co., Wilmington, Del		June 14, 1889.	B. D. Harris	46	50

No. of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
12	A. S. Elliott, Wilmington, Del		110	383	April 7, 1890.
25	Henry P. Scott, Wilmington, Del		111	256	April 7, 1890.

No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from.	No. of original certf.	No. of original shares.
61	15	Elliott, Johnson & Co., Wilmington, Del		June 15, 1889.	G. W. Carlisle	14	40
62	15	Thomas Jackson, Wilmington, Del		June 15, 1889.	G. W. Carlisle	14	40
63	25	W. A. Goodman, Cincinnati, Ohio		June 15, 1889.	John Carlisle	31	25
64	125	Henry Du Pont, Wilmington, Del		June 17, 1889.	G. W. Carlisle	87	75
					B. D. Harris	45	50
65	25	Geo. Eakins, Philadelphia		June 22, 1889.	G. D. Harris	43	50

No. of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
15	A. S. Elliott, Wilmington, Del		110	256	April 7, 1890.
2	James M. Glenn, Cincinnati, Ohio		146	2	Dec. 10, 1892.
2	R. Simpson, Cincinnati, Ohio		147	2	Dec. 10, 1892.
1	John Carlisle, Cincinnati, Ohio		148	1	Dec. 10, 1892.
25 20	W. A. Goodman, Cincinnati, Ohio		149	20	Dec. 10, 1892.
125	Henry A. Du Pont, Akenthillon Foster and Alexander D. Irving, Wilmington, Del., trustee of Henry Dupont, deceased.		138	125	Feb. 6, 1892.
25	Elizabeth C. Eakins, Philadelphia		132	25	July 6, 1891.

No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from.	No. of original certf.	No. of original shares.
66	25	Elliott, Johnson & Co.,	Wilmington, Del	June 22, 1899.	G. D. Harris	43	50
67	15	W. W. Spence,	Baltimore, Md	June 22, 1889.	G. D. Harris	43	50
			Error certificate cancelled.				
68	15	W. W. Spence,	Baltimore, Md	June 22, 1889.	G. W. Carlisle	13	50
69	13	R. H. Charles,	Baltimore, Md.	June 22, 1889.	G. W. Carlisle	13	50
70	3	Elizabeth T. Latimer,	Wilmington, Del	June 22, 1889.	G. W. Carlisle	13	50

No. of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
25	A. S. Elliott,	Wilmington, Del	120	383	

No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from.	No. of original certf.	No. of original shares.
71	29	Elliott, Johnson & Co.,	Wilmington, Del	June 29, 1890.	G. W. Carlisle	13	50
						14	40
72	3	Henry W. Rankin,	Madison, N. J.	July 1, 1889.	Geo. S. Richardson	40	26
26 73	15	S. M. Curtis,	Newark, Del	July 1, 1889.	Geo. S. Richardson	40	26
74	10	W. W. Spence,	Baltimore, Md	July 1, 1889.	John Carlisle	35	10
75	8	William Fait, care Fait & Winebresser,	Baltimore, Md	July 1, 1889.	Geo. S. Richardson	40	26

No. of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
29	H. P. Scott,	Wilmington, Del	111	256	April 7, 1890.

No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from.	No. of original certf.	No. of original shares.
76	25	Elliott, Johnson & Co.,	Wilmington, Del	July 1, 1889.	G. D. Harris	44	50
77	25	Sam'l Bancroft, Jr.,	Wilmington, Del	July 1, 1889.	G. D. Harris	44	50
78	34	Elliott, Johnson & Co.,	Wilmington, Del	July 1, 1889.	G. D. Harris	42	200
79	15	Elliott, Johnson & Co.,	Wilmington, Del	July 1, 1889.	G. D. Harris	42	200
80	15	Henry Lewis,	No. 238 Chestnut St., Philadelphia, Pa	July 1, 1889.	G. D. Harris	42	200

No. of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
25	A. S. Elliott, Wilmington, Del		110	383	April 7, 1890.
34	A. S. Elliott, Wilmington, Del		110	383	April 7, 1890.
15	A. S. Elliott, Wilmington, Del		110	383	April 7, 1890.

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No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from.	No. of original certf.	No. of original shares.
81	3	Elizabeth T. Latimer, 828 Market St., Wilmington, Del		July 1, 1889.	G. D. Harris	42	200
82	2	Elliott, Johnson & Co., Wilmington, Del		July 1, 1889.	G. D. Harris	42	200
83	45	James C. Holden, New York		July 1, 1889.	John Carlisle	39	224
84	179	John Carlisle, Cincinnati		July 1, 1889.	John Carlisle	39	224
85	25	John G. Reading, Philadelphia		July 22, 1889.	G. D. Harris	42	200

No. of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
2	A. S. Elliott, Wilmington, Del		110	383	April 7, 1890.
20	Sarah C. Holden, Madison, N. J.		130	20	May 7, 1891.
25	James C. Holden, New York		131	25	May 7, 1891.
10	Thomas Jackson, Wilmington, Del		102	10	Feb. 13, 1890.
5	Geo. Eakins, Philadelphia		119	5	Oct. 4, 1890.
10	Elliott, Johnson & Co., Wilmington, Del		103	10	Feb. 13, 1890.
5	Elliott, Johnson & Co., Wilmington, Del		118	5	Oct. 4, 1890.
10	Elliott, Johnson & Co., Wilmington, Del		104	10	Mar. 5, 1890.
10	Geo. Eakins, Philadelphia		105	10	Mar. 5, 1890.
50	Marian Carlisle, Cincinnati		112	50	April 14, 1890.
50	Elliott, Johnson & Co., Wilmington, Del		113	50	June 12, 1890.
5	Elliott, Johnson & Co., Wilmington, Del		114	5	June 12, 1890.
5	P. W. Stoffle, Philadelphia		115	5	Oct. 4, 1890.
2	S. M. Curtis, Newark, Del		116	2	Oct. 4, 1890.
3	Elliott, Johnson & Co., Wilmington, Del		117	3	Oct. 4, 1890.
14	John Carlisle, Cincinnati, O		126	14	Oct. 22, 1890.

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No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from.	No. of original certf.	No. of original shares.
86	25	Elliott, Johnson & Co.,	Wilmington, Del.	July 22, 1889.	G. D. Harris.	42	200
87	37	Elliott, Johnson & Co.,	Wilmington, Del.	July 23, 1889.	G. D. Harris.	42	200
88	38	John G. Reading,	Philadelphia	July 23, 1889.	G. D. Harris.	42	200
89	6	John Carlisle,	Cincinnati	July 23, 1889.	G. D. Harris.	42	200
90	10	Rev. G. W. Du Bois,	Keene Valley, N. Y.	Sept. 7, 1889.	G. D. Harris.	41	200

No. of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
25	A. S. Elliott,	Wilmington, Del.	110	383	April 7, 1890.
37	Henry P. Scott,	Wilmington, Del.	111	256	April 7, 1890.
6	John Carlisle,	Cincinnati	135	95	July 6, 1891.

No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from.	No. of original certf.	No. of original shares.
91	10	Elliott, Johnson & Co.,	Wilmington, Del.	Sept. 7, 1889.	B. D. Harris.	41	200
92	25	Jacob Tome,	Port Deposit, Md.	Oct. 26, 1889.	B. D. Harris	26	150
93	25	Elliott, Johnson & Co.,	Wilmington, Del.	Oct. 26, 1889.	B. D. Harris	26	150
94	5	Elliott, Johnson & Co.,	Wilmington, Del.	Nov. 9, 1889.	B. D. Harris.	26	150
95	5	Est. Sam'l Morris, dec'd,	Chatham P. O., Chester Co., Pa.	Nov. 9, 1889.	B. D. Harris.	26	150

No. of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
10	A. S. Elliott,	Wilmington, Del.	110	383	April 7, 1890.
25	A. S. Elliott,	Wilmington, Del.	110	383	April 7, 1890.
5	Henry P. Scott,	Wilmington, Del.	111	256	April 7, 1890.

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No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from	No. of original certf.	No. of original shares.
96	8	S. M. Curtis,	Newark, Del.	Dec. 7, 1889.	B. D. Harris.	26	150
97	7	Elliott, Johnson & Co.,	Wilmington, Del.	Dec. 8, 1889.	B. D. Harris.	26	150
98	13	Elliott, Johnson & Co.,	Wilmington, Del.	Dec. 9, 1889.	B. D. Harris	26	150
99	12	David B. Scott,	110 W. 122d St., N. Y.	Dec. 9, 1889.	B. D. Harris.	26	150
100	50	John Carlisle,	Cincinnati	Dec. 9, 1889.	B. D. Harris.	26	150

No. of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
7	A. S. Elliott, Wilmington, Del		110	383	April 7, 1890.
13	A. S. Elliott, Wilmington, Del.		110	383	April 7, 1890.
50	Chas. J. Cragin, Philadelphia		101	50	Dec. 21, 1889.

No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from	No. of original certf.	No. of original shares.
101	50	Charles J. Cragin, 119 S. 4th St., Philadelphia		Dec. 21, 1889.	John Carlisle	100	50
102	10	Thomas Jackson, Wilmington, Del		Feb. 13, 1890.	John Carlisle	84	179
103	10	Elliott, Johnson & Co., Wilmington, Del		Feb. 13, 1890.	John Carlisle	84	179
104	10	Elliott, Johnson & Co., Wilmington, Del		Mar. 5, 1890.	John Carlisle	84	179
105	10	Geo. Eakins, Philadelphia		Mar. 5, 1890.	John Carlisle	84	179

No. of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
10	Henry P. Scott, Wilmington, Del		111	256	April 7, 1890.
10	A. S. Elliott, Wilmington, Del		110	383	April 7, 1890.
10	Elizabeth C. Eakins, Philadelphia		133	10	

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No. of original certificate.	No. of original shares.	Issued to	Residence.	Date.	Transferred from				
106	125	Elliott, Johnson & Co., Wilmington, Del		March 7, 1890.	B. D. Harris	41	200		
107	125	Chas. Graham, 400 Chestnut St., Philadelphia		March 7, 1890.	B. D. Harris	41	200		
					G. D. Harris	27	150		
108	20	Martin Lane, Baltimore, Md		March 8, 1890.	G. D. Harris	27	150		
109	20	Elliott, Johnson & Co., Wilmington, Del		March 8, 1890.	G. D. Harris	27	150		
110	383	Alfred S. Elliott, Wilmington, Del		April, 1890.	E. J. & Co	47	47	26	28
						55	56	15	12
						61	66	25	25
						76	78	2	34
						82	86	10	25
						91	93	7	25
						97	98	10	13
						104	79		15

No. of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
125	Henry P. Scott,	Wilmington, Del	111	256	April 7, 1890.
20	Henry P. Scott,	Wilmington, Del	111	256	April 7, 1890.

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No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from.	No. of original certf.	No. of original shares.
111	256	Henry P. Scott,	Wilmington, Del	April, 1890.	Elliott, Johnson	51	5
						60	25
						71	29
						87	37
						94	5
						103	10
						106	125
						109	20
112	50	Morton Carlisle,	Cincinnati	April 14, 1890.	John Carlisle	84	179
113	50	Elliott, Johnson & Co.,	Wilmington, Del	Jan. 21, 1890.	John Carlisle	84	179
114	5	Elliott, Johnson & Co.,	Wilmington, Del	June 2, 1890.	John Carlisle	84	179
115	5	W. P. Stoffee,	Philadelphia	June 2, 1890.	John Carlisle	84	179

No. of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
60	Frank H. Pinkerton,	Newcastle, Del	139		Feb. 20, 1891.
196	Henry P. Scott,	Wilmington, Del	140		Feb. 20, 1891.
50	A. S. Elliott,	Wilmington, Del	26	60	Oct. 22, 1891.
5	A. S. Elliott,	Wilmington, Del	26	60	Oct. 22, 1891.

No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from.	No. of original certf.	No. of original shares.
116	2	S. M. Curtis,	Newark, Del	Oct. 4, 1890.	John Carlisle	84	179
117	3	Elliott, Johnson & Co.,	Wilmington, Del	Oct. 4, 1890.	John Carlisle	84	179
32 118	5	Elliott, Johnson & Co.,	Wilmington, Del	Oct. 4, 1890.	John Carlisle	84	179
119	5	Geo. Eakins,	Philadelphia	Oct. 4, 1890.	John Carlisle	84	179
120	10	Martin Lane,	Baltimore, Md	Oct. 13, 1890.	G. D. Harris	27	150

No. of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
3	Henry P. Scott,	Wilmington, Del	125	41	Oct. 22, 1890.
5	A. S. Elliott,	Wilmington, Del	126	60	Oct. 22, 1890.
5	Elizabeth C. Eakins,	Philadelphia	124	5	July 6, 1891.

No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from.	No. of original certf.	No. of original shares.
121	35	Elliott, Johnson & Co.,	Wilmington, Del	Oct. 13, 1890.	G. D. Harris.	27	150
					to Hinsdale.....	15	5
122	25	Chas. H. Graham,	Philadelphia	Oct. 13, 1890.	John Carlisle.....	3	25
123	7	Geo. W. Du Bois,	Keene Valley, N. Y	Oct. 18, 1890.	Geo. W. Du Bois....	10	54
124	3	Elliott, Johnson & Co.,	Wilmington, Del	Oct. 18, 1890.	Geo. W. Du Bois....	10	54
225	41	Henry P. Scott,	Wilmington, Del	Oct. 22, 1891.	Elliott, J. & Co.....	117	3
						121	35
						124	3

No of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
35	Henry P. Scott,	Wilmington, Del	125	41	Oct. 22, 1890.
2	E. James Dallett.	Wilmington, Del	128	2	Mar. 17, 1891.
5	Geo. W. Du Bois,	Keene Valley, N. Y	129	5	Mar. 17, 1891.
3	Henry P. Scott,	Wilmington, Del	125	41	Oct. 22, 1891.

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No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from.	No. of original certf.	No. of original shares.
126	60	Alfred S. Elliott,	Wlimington, Del	Oct. 22, 1891.	Elliott, J. & Co.....	113	50
						114	5
						117	3
						118	5
						121	35
						124	3
127	14	John Carlisle	Cincinnati	Oct. 20, 1890.	John Carlisle..	84	179
128	2	E. James Dallett,	Wilmington, Del	Mar. 17, 1891.	Geo. W. Du Bois ...	123	7
129	5	Geo. W. Du Bois,	Keene Valley, N. Y	Mar. 17, 1891.	Geo. W. Du Bois....	123	7
130	20	Sarah D. Holden,	Madison, N. J	May 4, 1890.	J. C. Holden.....	83	45

No. of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
14	John Carlisle, Cincinnati		135	95	July 6, 1891.

No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from.	No. of original certf.	No. of original shares.
131	25	James C. Holden,	New York	May 7, 1892.	Jas. C. Holden	83	45
132	25	Elizabeth C. Eakins,	616 Chestnut St., Philadelphia	July 6, 1891.	Geo. Eakins	65	25
133	10	Elizabeth C. Eakins,	616 Chestnut St., Philadelphia	July 6, 1891.	Geo. Eakins	105	10
134	5	Elizabeth C. Eakins,	616 Chestnut St., Philadelphia	July 6, 1891.	Geo. Eakins	119	5
135	95	John Carlisle,	Cincinnati	July 6, 1891.	John Carlisle	30	1
						25	4
34						16	5
						4	7
						6	89
						14	127
136	100	John Carlisle,	Cincinnati	July 6, 1891.	John Carlisle	2	200
137	100	John Carlisle,	Cincinnati	July 6, 1891.	John Carlisle	2	200
138	125	Henry A. Du Pont, A. Kentillon Forster and Alexander D. Irving, Wilmington, Del., trustees under the will of Henry Du Pont, dec'd.		July 6, 1891.	Henry Du Pont	64	125
139	60	Frank H. Pinkerton,	Newcastle, Del	Feb. 20, 1892.	Henry P. Scott	111	256
140	196	Henry P. Scott,	Wilmington, Del	Feb. 20, 1892.	Henry P. Scott	111	256
141	200	Edgar W. Stoddard,	Brattleboro, Vt	Dec. 10, 1892.	B. D. Harris	25	200
142	400	Edgar W. Stoddard,	Brattleboro, Vt	Dec. 10, 1892.	B. D. Harris	16	100
						17	100
						18	100
						19	100
143	200	Edgar W. Stoddard,	Brattleboro, Vt	Dec. 10, 1892.	G. D. Harris	20	100
						21	100
144	200	Edgar W. Stoddard,	Brattleboro, Vt	Dec. 10, 1892.	G. D. Harris	22	100
						23	100
145	200	Edgar W. Stoddard,	Brattleboro, Vt	Dec. 10, 1892.	G. D. Harris	24	100

No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from.	No. of original certf.	No. of original shares.
146	2	James M. Glenn,	Cincinnati, O.	Dec. 10, 1892.	W. A. Goodman	63	25
147	2	Robert Simpson,	Cincinnati, O.	Dec. 10, 1892.	W. A. Goodman	63	25
148	1	John Carlisle,	Cincinnati, O.	Dec. 10, 1892.	W. A. Goodman	63	25
149	20	W. A. Goodman,	Cincinnati, O.	Dec. 10, 1892.	W. A. Goodman	63	25
150	2	W. J. Carrey,	Cincinnati, O.	Dec. 10, 1892.	W. A. Goodman	63	25

No. of shares transferred.	Transferred to	Residence.	No. of certf.	No. of shares.	Date.
2	W. J. Corey,	Cincinnati	150	2	Dec. 10, 1892.
2	I. Woodward,	Cincinnati	151	2	Dec. 10, 1892.
1	Wm. Black,	Covington	152	1	Dec. 10, 1892.
15	W. A. Goodman,	Cincinnati	153	15	Dec. 10, 1892.

No. of certificate.	No. of shares.	Issued to	Residence.	Date.	Transferred from.	No. of original certf.	No. of original shares.
151	2	I. Woodward		Dec. 10, 1892.	W. A. Goodman	149	20
152	1	Wm. Black,	Covington	Dec. 10, 1892.	W. A. Goodman	149	20
153	15	W. A. Goodman,	Cincinnati	Dec. 10, 1892.	W. A. Goodman	149	20
154	100	Jacob Tome,	Cincinnati	June 6, 1893.	G. W. Carlisle.	12	100

36 EXHIBIT "16."

WILMINGTON, DEL., *Apr.* 18, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: Your favor of 16th received. We wrote you yesterday, which will cover what you request, but now restate that our plan is to undertake to float your bonds, provided the further examinations, legal and engineering, are favorable, without assuming any responsibility, so that the bonds, with 50 per cent. of the Great Western Mining and Manufacturing Company's capital stock, as a bonus, will net you 85 per cent.

As we wrote yesterday, we have corresponded with Prof. A. G. Wetherby.

Yours truly, ELLIOTT, JOHNSON & CO.

EXHIBIT "17."

WILMINGTON, DEL., *Apr.* 15, 1891.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: Your favor of the 13th inst., with stated enclosure, received. As we suggested to you, we referred the papers to Hatch & Foote, of New York city, for our joint action if it meets with your approval, and hope to give you a definite answer in a day or two.

Very truly, ELLIOTT, JOHNSON & CO.
H. G. S.

EXHIBIT "18."

WILMINGTON, DEL., *Apr.* 17, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: We have your favor of 15th inst. with inclosure. We have not been able to interest Hatch & Foote, but feel that
37 we can sell the bonds per Smally and with our connections, and are ready to go ahead. We will not assume any responsibility such as by purchasing or guaranteeing to float them, merely to issue them over our name provided developments are satisfactory. We return the resolutions. They seem to cover the ground except that some provision should be made so that the sinking fund will be increased annually, provided more than a determined amount is mined and provision made for its investment in the bonds of the company. Also other resolutions should be passed covering the issuance of stock and the 50 per cent. bonds.

We are corresponding at once with Prof. A. G. Wetherby.

Also we should like to select the trust company which will act as trustee, and at which bonds and interest will be payable.

Yours truly, ELLIOTT, JOHNSON & CO.

EXHIBIT "19."

WILMINGTON, DEL., *Apr.* 22, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: We have your favor of 20th inst. We are very willing to have your attorney prepare the papers, but wish Mr. Samuel B. Huey, of Drexel building, Philadelphia, to pass upon them and are so writing him. Won't you have your lawyer write him, giving papers when he has them drawn?

Yours truly, ELLIOTT, JOHNSON & CO.

EXHIBIT "20."

WILMINGTON, DEL., *Apr.* 23, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: Your favor 21st inst. rec'd, and is now having our attention. We shall report to you shortly.

Very truly, ELLIOTT, JOHNSON & CO.

38 EXHIBIT "21."

(Dictated.)

WILMINGTON, DEL., *Apr.* 24, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: Your favors of 21st and 22d duly received. The utmost we can do is to agree to float the bonds as rapidly as possible, using our best endeavors. We can not undertake to name a specific time within which we will agree to sell them, neither do we see our way clear to attempt to take subscriptions for them. This latter we would consider a very bad plan. We find that people only take bonds nowadays when they are ready to be delivered, and seriously object to binding themselves to take bonds provided the subscription is all taken.

We believe we can sell them twice as fast as we could get subscriptions for them, and further that within thirty days from the time that the physical examination is made that we can sell enough to supply your wants, if not to close them all out. However, we must not lose sight of the fact that the feeling in the East is decid-

edly blue over coal properties, particularly since the late decline has been made in Hocking valley.

Neither can we go ahead with advantage until we get the physical report, as we will rely in a great measure upon it to make sales. However, in the meantime we will do some talking. Please mail us a definite acceptance of our terms, giving us absolute control of the matter and putting it in such shape as will constitute our authority. Also mail us anything which you can suggest in addition to the data we now have and the report to be made by Prof. Wetherby to aid in making an attractive circular.

Yours truly, ELLIOTT, JOHNSON & CO.

EXHIBIT "22."

WILMINGTON, DEL., *Apr.* 26, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: Your favor of 24th received. Prof. Wetherby wrote us on the 23d stating that he will see you as soon as he can
39 get away from court. We of course understand that your company pays his expenses and fee.

Yours truly, ELLIOTT, JOHNSON & CO.

EXHIBIT "23."

(Dictated.)

WILMINGTON, DEL., *Apr.* 29, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: We thank you for your favors of the 27th inst. We will forward a proof of our circular for your examination, but as it depends so largely upon Prof. Wetherby's report, we can not get it out until we hear from him. In the meantime, we will have everything prepared for immediate action. To this end, so soon as the mortgage is drawn in permanent shape and passed upon by Mr. Huey. Please have it printed. Better have about 300 copies. This can be done while the bonds are being lithographed. Also please have the presidents of the bank- who endorsed Prof. Wetherby's letter, also endorse the valuation he will make in his report. The only additional point which will not then be covered, as far as we can now see, is the demand for additional output. In addition to the letters which you can get from your present customers showing their valuation of the quality of the coal, can not you have statements made from people who would be purchasers were you able to fill their orders? This will be a strong point. Also have prepared for us, please, statement of your last few years' operations showing gross

earnings, operating expenses, and how the net is derived. By the way, there should be a clause in the mortgage requiring that bonds of the new issue to the amount of those outstanding shall be held by the trust company to be released only in exchange for these old bonds. This is important. Our present plan is to offer the bonds in our circular at 95, with but 25 per cent. in stock. We do this so that we make large concession in price and give the additional stock to some big customers we hope to induce to purchase. They will be very much more apt to buy if they think special terms are made for them. We hope to be able to work off most of the bonds this way.

40 Kindly forward us maps, as many as you can spare, up to a hundred.

We propose to take off our coats and push this matter so soon as it is in complete shape. To offer it earlier would hurt it. We shall work with confidence, as we believe in your company and yourselves.

Yours truly, ELLIOTT, JOHNSON & CO.

We enclose a statement of the Bank of Louisville. One of our customers holds some stock, and wishes us to ascertain whether he had best continue to hold or sell. Can you conveniently get us an opinion? We will much appreciate it.

EXHIBIT "24."

WILMINGTON, DEL., 27*th April*, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: Your favor 25th inst. rec'd, and we would suggest that it would probably be better to forward us copy of bond, etc., before it is lithographed. We should also like to have a provision for registration of the principal of the bond and interest coupons.

Very truly yours, ELLIOTT, JOHNSON & CO.
H. G. S.

EXHIBIT "25."

WILMINGTON, DEL., *Apr.* 5, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: Mr. Needles has called our attention to your letter to him. We are disposed to take up your matter and offer your bonds to our customers, and believe if we do so we will succeed in placing them. If we agree to do so providing our experts' examination is satisfactory, will you put the matter in our hands, absolutely, to handle and take $255,000 less 2½ per cent. for the $300,000 bonds?

We feel sure, particularly with your offer to guarantee the first $50,000, that we could work off in near future, after getting
41 data and reports into shape, to supply all of your needs, but would not care to purchase them ourselves.

Let us know, please, promptly and we will go to work at once. Is the company's present indebtedness in shape to be paid off at once, making this $300,000 loan a first lien?

Yours truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "26."

WILMINGTON, DEL., *May* 10, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR:. We saw Mr. Huey to-day. He has carefully read the papers and likes them. We have also gone over them and think them in good shape. We will go to Baltimore on Monday and leave them with the Mercantile Trust. Will report to you after our interview with them. We will go right to work to get our circular in shape, but want the earnings to do so.

You have not stated who those attorneys were who drew these papers and made search. So soon as papers are executed and recorded, we wish your attorney to write us, stating that this mortgage is the only lien upon the property excepting the $60,000 one, that papers are legally drawn, etc., and on top of it we will get letter from Mr. Huey.

These two letters will cover the legal ground, so please see that your attorney writes us fully and satisfactorily. Won't you give us a list of the holders of the present bonds, intimating how many of them can be induced to exchange and on what terms the others will sell out. We wish to remove this lien as soon as possible. We notice your bonds will bear interest July 1st. We would like to get to work as much sooner as possible, and could do so by rebating interest to July 1st on all sales made previously. We are depending upon you to print the mortgage and map. We will get up the other data and send you proof. We will have to print the attorneys' certificate later. Already we have a good many people interested in this loan and awaiting our issuance of it.

Yours truly,

(Signed) ELLIOTT, JOHNSON & CO.

42 Where is the Equitable nat'l bank of which James R. Murdoch is V.-P.? If possible, let us make the terms of exchange with the old holders.

EXHIBIT "27."

WILMINGTON, DEL., *May* 14, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: First and most important to note the trust company's correct title is "Mercantile Trust and Deposit Company of Baltimore." The writer called on them yesterday and went over the papers. We return them herewith to you. They desire that in the article reciting the $60,000 mortgage you give the date of the mortgage, which will make a more exact recital. They also attach, you will find, two articles covering their responsibility, which they wish inserted. These are the usual articles they have put in all obligations for which they are the trustee. They object to the statement that this is the first mortgage, saying that as it is distinctly a second, they would not care to lend their names to its being called a first. We argued the matter with them at some length, being determined upon retaining the word "first," claiming that the statement that the present bonds are to be retired and the full explanation given both in the mortgage and our circular made it proper to do so. They finally agreed to it on condition that we get the assurance that right in the start, or very early in the negotiation, the $60,000 bonds can and will be retired. We hope that you can give this.

They require that the mortgage when recorded be filed with them and upon such filing they will sign the bonds.

Why can not these bonds be dated June 1st instead of July 1st and the coupons made payable June and December? So many securities become due in January and July that many people prefer the more unusual months. Then we are very anxious to get to work on them and have several good customers now waiting to have them presented to them. We feel that if we can get to work shortly we can make you a very successful negotiation, and can not see why everything can not be done in the next fifteen days.

43 We also enclose you in typewriter a rough idea of what we propose to get out in the way of a circular. It will be polished up somewhat, and we hope to have you make any corrections, fill in the blanks, and criticise freely. We thing it very much better following our idea to print the report on the circular and have all the data completed in one paper. The first page we propose to have entirely in prominent type, thus trying to catch attention to the after details. We hardly think it wise, either, to cut the report, but of course will do as you desire. Please return it to us as soon as possible and we will get it into shape while you are attending to the mortgage, etc. Please send us so soon as they are printed, a dozen specimen copies of the bonds, of course cutting them so that they can not be used. The map which will do us the most good is the one show-

ing the location of the property as regards Cincinnati, giving the river, the railroad connections, etc.

Yours truly,

(Signed) ELLIOTT, JOHNSON & CO.

Come on when you get things in shape. Mr. S. Scott wishes to entertain you, and the Drs. are anxious to beat us again.

H. P. S.

EXHIBIT "28."

WILMINGTON, DEL., *June* 28, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: Your good favor, 5th inst., enclosing cert. No. 47 for 125 shs. Gt. West'n M. & M. Co. stock as rated, rec'd, for which we thank you.

Very truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "29."

WILMINGTON, DEL., *June* 10, 1889.

Mr. John Carlisle, treas'r, Cincinnati, Ohio.

DEAR SIR: Since writing you this a. m., we have received your favor 8th inst., enclosing certfs. stk. of Gt. Western Mng. & Mfg. Co., as follows:

44 No. 50, name of H. S. Platt for 5 shares.

No. 52, name of W. E. Keybold for 2 shares.

No. 53, name of Emma and Julia N. Clark for 3 shares.

No. 54, name of George W. Bois for 10 shares.

Nos. 49, 51 and 55, name of Elliott, Johnson & Co. for 45 shares in all.

We thank you for the letter of Mr. Nielson, and will see what we can do.

Very truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "30."

WILMINGTON, DEL., *June* 10, 1889.

Mr. John Carlisle, treas'r, Cincinnati, Ohio.

DEAR SIR: Your favor 6th inst., enclosing 25 shares Gt. Western M. & M. stock in name of J. G. Kraft, rec'd. We note you desire Mr. K.'s receipt. We should prefer that you accept our receipt, and

we could then hold his receipt, as our own voucher and the stock is made in his name. However, if you desire it, we will forward you his receipt.

The bill of Mr. Huey is correct. In our letter of the 3d we also requested that you send us 25 shares stock in our own name to correspond with the 25 shares you send for Mr. Kraft.

In our letter to you of the 5th inst., enclosing check, $4,250, we noted that we would advise you later of names for the 25 shares stock. Please send 13 shs. of this 25 shrs. in name of G. A. Liebig, of Baltimore, Md., and the remaining 12 shs. in our own name, and oblige,

Yours truly,

(Signed) ELLIOTT, JOHNSON & CO.
H. W.

EXHIBIT "31."

WILMINGTON, *June* 12, 1889.

Mr. John Carlisle, treas'r the Gt. Western Min. & Mfg. Co., Cincinnati, Ohio.

DEAR SIR: We enclose you our No. 8518, payable in New Yok for $8,500, in payment for $10,000 1st mtge. 6 per cent. bonds
45 and $5,000, the capital stock the Gt. Western Min. & Mfg. Co. Kindly forward certificate for 25 shs. stock in name of Jacob Tome, of Port Deposit, Md., and 25 shs. in our name.

This is the Hon. Mr. Tome, of Maryland, one of the wealthiest men in this section of the East. We have given him an option on $20,000, to be taken any time up to July 12, making him a concession in price and agreeing to charge him but 5 per cent. interest from June 15, hoping thus to get him to purchase up to $30,000, which we think he will do. His name will do us good. We have sold a good many of the bonds; quite a number yet to be paid for, say by the middle of July. All of them will, of course, be entitled to the July div'd, as would be Mr. Tome on the above, so that at the regular time of closing your books we will send you a statement upon how many shares the div'd is due. The bonds drag more than we anticipated, but we are working hard. However, all bonds are slow for the moment, and will likely be brisk enough after July 1.

I have been trying to get an opportunity for some days to write to you and thank you for your many courtesies, as well as for your promise to see that we have means of supporting the market after the bonds are listed. It is absolutely necessary to do so, and in my judgment is more like to be profitable than a losing transaction. We shall endeavor to make it so. Will forward funds to you rapidly as possible.

Yours truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "32."

WILMINGTON, DEL., *June* 13, 1889.

Mr. John Carlisle, treas'r, Cincinnati, Ohio.

DEAR SIR: Your favor 11th inst. was not rec'd until after we had written you and Mr. Goodman this a. m. As we wrote, we accept the proposition. We enclose you herewith N. Y. funds for $5,100 in payment for $6,000 Gt. Western Mng. & Mfg. Co. 1st mtge. 6 per cent. bonds and 50 per cent. stock of said company.

46 Please send us certfs. for 15 shs. stock in name of Thomas Jackson, of this city, and 15 shs. in our own name.

We are to-day communicating with Mr. Holden regarding Dr. Aitman's bond. We shall deduct the commission on the Goodman $5,000 from the next remittance, as this one was made up before receiving your letter.

Very truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "33."

WILMINGTON, DEL., *June* 14, 1889.

Mr. John Carlisle, treas'r, Cincinnati, Ohio.

DEAR SIR: Your favor 12th inst., enclosing certifs. Nos. 56 and 58, for 12 shs. stock Gt. Western Mng. & Mfg. Co. in name of Elliott, Johnson & Co., and 13 shs. name of G. A. Liebig, respectively rec'd. We enclose you herewith N. Y. funds to your order, chk. No. 8523 for $20,750 in payment for 25 Gt. Western Mng. & Mfg. Co. 1st 6's and 50 per cent. stock do. C. 85 ..... $21,250

Less com. on $5M. do. shipped you yesterday for W. A. Goodman..... 500

$20,750

Please send us 125 shares stock in name of Henry Du Pont, of this city. This is the balance of the $50M. bonds he purchased, and you will remember the stock on the first $25M. was all made over to us.

Very truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "34."

WILMINGTON, DEL., *June* 13, 1889.

Mr. John Carlisle, treas'r the Great Western Min. & Mfg. Co., Cincinnati, Ohio.

DEAR SIR: We enclose you herewith a letter just received from Mr. W. A. Goodman. If you will send us a receipt as treas-

47 urer for $4,750 (in payment for $5,000 bonds and $2,500 stock and credit of $500 to be deducted by us from the next re-

mittance,) in lieu of the accepted order on you he mentions, we will be very glad to make the sale, giving him the 50 per cent. stock, though we would desire that the conditions be strictly confidential, and we have agreed not to give over 25 per cent. stock, and, in fact, the additional 25 per cent. must be considered on account of his aid, etc., in letters, opinions, etc.

We are sending you $5,000 bonds, Nos. 108, 109, 110, 111 and 112, by registered mail insured.

Yours truly,

(Signed) ELLIOTT, JOHNSON & CO.

Kindly wire us if you make this sale.

EXHIBIT "35."

WILMINGTON, DEL., *June* 15, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: Thank you for your favors of 12th and 13th. We forwarded Mr. Du Pont's balance yesterday, wiring you that we had done so. We count that we have sent you $75,150, besides the $5,000 bonds for Mr. Goodman, or $4,750 more. Expect to send you $10,000 more the first of the week. We keep selling them every day or so, and are hard at work. Let us know when you will be on.

Yours truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "36."

WILMINGTON, DEL., *June* 17, 1889.

Mr. John Carlisle, treas'r, Cincinnati, Ohio.

DEAR SIR: Your favors 14th and 15th inst., enclosing certfs. for stock of Gt. Western Min. & Mfg. Co., viz.:

No. 59, name, Jacob Tome	25 shs.
No. 60, name, Elliott, Johnson & Co	25 shs.
No. 61, name, Elliott, Johnson & Co	15 shs.
No. 62, name, Thos. Jackson	15 shs.

48 The plan as you suggest for the cancellation of the old bonds is agreeable to our views. We also enclose the Phila. Nat'l Bk.'s draft, No. 514, on N. Y. for $8,500 in payment for $10,000 Gt. Western Min. & Mfg. Co. 1st mtge. 6 per cent. bonds and 50 per cent. stock of same company. Please transfer 25 shs. to name of Geo. Eakins, of Philadelphia, and 25 shs. to our own name, and oblige,

Very truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "37."

WILMINGTON, DEL., *June* 19, 1889.

Mr. John Carlisle, treas'r, Cincinnati, Ohio.

DEAR SIR: Your favor of 17th inst. enclosing certf. No. 64 for 125 shs Gt. Western Min. & Mfg. Co. stock in name of Henry Du Pont, rec'd. We also thank you for the div'd resolution, and think it will be likely to help us. Have you rec'd the bonds we sent you to meet Mr. Goodman's purchase?

In payment for $12,000 Gt. Western Min. & Mfg. Co. 1st mtge. 6 per cent. and 50 per cent. stock of same company, at 85, we enclose our check No. 8529 certified on N. Y. for $10,200.

Please transfer 15 shs. stock to name of W. W. Spence, of Baltimore, Md. Also 13 shs. of same to name of Richard H. Charles, of Baltimore, Md., and 3 shs. to name of Elizabeth T. Latimer, of this city, and the balance, viz.: 29 shs., to our own name.

Very truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "38."

WILMINGTON, DEL., *June* 24, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: Your favor 22d inst., enclosing certfs. Nos. 65, '6–'8–'9, 70 and 71, for in all 110 shs. Gt. Western M. & M. Co. stock, as stated, rec'd, for which we are obliged.

49 We have not as yet rec'd any word from Mr. Holden about the Aitman bond. We note you have again written him.

Very truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "39."

WILMINGTON, DEL., *June* 20, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: We communicated with the Mercantile Trust and Deposit Co. regarding your plan for cancellation of the old issue of the Gt. Western M. & M. Co. bonds and enclose you herewith their reply. We wrote to Mr. Holden in regard to Dr. Aitman's bonds about a week ago, but have received no reply up to the present time.

Yours truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "40."

WILMINGTON, DEL., *June* 28, 1889.

Mr. John Carlisle, treas'r, Cincinnati, Ohio.

DEAR SIR: We to-day received the $1,000 Gt. Western M. 7 per cent. bond, old issue, from Dr. Aitman, and forwarded it at once per express to Mr. B. D. Harris, at Brattleboro, Vt. We have also forwarded to Dr. Aitman the exchange bond and 3 shs. stock mentioned below in name of Rankin is for his order. He retained the coupon due July 1st prox.

We enclose herewith our check, No. 8545, for $5,000, to your order, in payment for $6,000 Gt. Western M. & M. Co. 6's c. 85 less $100 cou. on the Aitman bond. This seems quite a good exchange, as he might have demanded payment in full. Please transfer the following stock of the Gt. Western M. & M. Co. and forward at your earliest opportunity:

3 shs. to Henry W. Rankin, of Madison, N. J.
15 shs. to S. N. Curtis, of Newark, Del.
10 shs. to W. W. Spence, of Baltimore, Md.
8 shs. to Wm. Fait, of Baltimore, Md.

50 This will slightly overdraw our account, but these bonds are positively sold, and we will be paid for same soon after the first of next month, and the parties desired stock in their name by 1st prox.

Very truly,
(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "41."

WILMINGTON, DEL., *June* 3, 1889.

Mr. John Carlisle, treas'r, Cincinnati, Ohio.

DEAR SIR: In payment for $12,000 1st mtge. 6 per cent. bonds, with 50 per cent. stock of the Great Western Mng. & Mfg. Co. at 85, we enclose our check, No. 8496, certfd. on N. Y. for $10,200.

Kindly have 25 shs. stock made in name of J. G. Kraft, of Baltimore, Md., and 25 shs. in our name. We shall advise you in a day or two respecting the remaining 10 shs.

Very truly,
(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "42."

WILMINGTON, DEL., *June* 5, 1889.

Mr. John Carlisle, treas'r the Gt. Western M. & Mfg. Co., Cincinnati, Ohio.

DEAR SIR: We enclose you herewith our No. 8502, payable in New York for $4,250, in payment for $5,000 Gt. Western M. & Mfg. Co. 1st mtge. 6's and $2,500 capital stock said company. Will send you name for this stock in a day or two. Please forward certf. for 5 shs., stock in name of H. S. Platt, of Baltimore, and 5 shs. to Elliott, Johnson & Co. This is the $100 stock, which we did not instruct you about yesterday.

Yours truly,

(Signed) ELLIOTT, JOHNSON & CO.

51 EXHIBIT "43."

WILMINGTON, DEL., *June* 6, 1889.

Mr. John Carlisle, treas'r, Cincinnati, Ohio.

DEAR SIR: In payment for $6,000 Gt. Western Mng. & Mfg. Co 1st 6's with $3,000 stock of same company at 85, we enclose our check No. 8507, to your order for $5,100.

Please have 2 shs. stock in name of W. E. Reybold, of Delaware City, Del.; 3 shs. in name of Emma and Julia N. Clark of Delaware City, Del.; 10 shs. name of George W. Du Bois, care of ourselves, and the balance, 15 shs., in our name.

Very truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "44."

Memorandum.

JUNE 1, 1889.

From Elliott, Johnson & Co., Wilmington, Del.

To Mr. John Carlisle, sec'y, Cincinnati, Ohio.

DEAR SIR: Please have the $12,500 par value stock of the Gt. Western Mng. & Mfg. Co. purchased to-day, transferred to name of Elliott, Johnson & Co., and oblige,

Very truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "45."

WILMINGTON, DEL., *July* 1, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: We have had more success since writing you. Besides some little matters, we have just received a telegram from Mr. James Y. Jackson, of Augusta, Ga., a banker and a friend of ours, accepting our offer of $25,000 of them to be paid for in 60 52 days, he, of course, to pay the accruing interest. We wish to notify you of this at once, since our proposition includes the dividend to him. This, of course, he is entitled to, since he orders before the closing of the books. Anyhow, we understand that you allow us to make sales any time prior to July 15, the dividend payable July 15 to go to the purchaser, even though the bonds may not be paid for until later. Counting the option for $4,000 given to Mr. Du Bois, and the option for $20,000 given to Mr. Tome, both of which we think will be taken, we count that, we have placed now $245,000. This includes a lot of $6,000 sold on Saturday, which will be probably paid for to-morrow or Wednesday, when we will remit to you. It now looks as if we would have no trouble closing them out before August 1st. In the meantime, we suggest that you get in shape the data for listing the bonds and stock on the Baltimore stock exchange. They should be listed so soon as all are positively sold. Your favor 29th received, and we will be very glad to see you next week.

Yours truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "46."

WILMINGTON, DEL., *July* 1, 1889.

John Carlisle, Esq.. Cincinnati, Ohio.

DEAR SIR: In payment for $10,000 1st mtge. 6 per cent. bonds Gt. Western Mng. & Mfg. Co. and 50 per cent. stock of same at 85, we enclose our check, No. 8556, certfd. on N. Y. city for $8,500. Please register 25 shs. stock name Samuel Bancroft, Jr., of this city, and 25 shs. in our own name. This stock carries dividends with it, we understand. These bonds are not of the lots referred to in our letter of 28th ult. We expect to pay for them in a day or two, and will give name for balance of the stock with these lots then.

Very truly,

(Signed) ELLIOTT, JOHNSON & CO.

53 EXHIBIT "47."

WILMINGTON, DEL., *July* 2, 1889.

Mr. John Carlisle, treas'r, Cincinnati, Ohio.

DEAR SIR: In our letter to you of 28th ult., enclosing payment for $7,000 Gt. Western and 35 shs. stock, we requested you to transfer 36 shs. to various persons for reasons therein stated, thus overdrawing our account by one share. We enclose herewith our check, No. 8556, for $5,950, in payment for $7,000 1st mtge. 6 per cent. bonds Gt. Western M. & M. Co. and 50 per cent. stock of same, viz., 35 shares. Please transfer 34 shs. stock (viz.: 35 shs. due, less one share overdrawn) to our own name, and forward us at your earliest convenience, and oblige.

Very truly,

(Signed) ELLIOTT, JOHNSON & CO.

Our understanding is that this stock will carry the div'd payable 15th inst.

E., J. & CO.

EXHIBIT "48."

WILMINGTON, DEL., *July* 3, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: The list for dividends so far is as follows:

	Henry Du Pont, Wilmington	125 shares.
	J. G. Kraft, Baltimore	25 shares.
	H. S. Platt, Baltimore	5 shares.
	W. E. Reybold, Delaware City	2 shares.
	Emma and Julia N. Clark, Delaware City	3 shares.
	Rev. Geo. W. Du Bois, Keene Valley, N. Y.	10 shares.
	G. A. Liebig, Baltimore	13 shares.
	Jacob Tome, Port Deposit, Md	25 shares.
	Thomas Jackson, Wilmington	15 shares.
	George Eakins, Philadelphia	25 shares.
	W. W. Spence, Baltimore	25 shares.
	Richard H. Charles, Baltimore	13 shares.
	Miss Elizabeth T. Latimer, Wilmington (6 sh.)	3 shares.
	Henry W. Rankin, Madison, N. J.	3 shares.
54	S. M. Curtis, Newark, Del.	15 shares.
	William Fait, Baltimore	8 shares.
	Samuel Bancroft, Jr., Wilmington	25 shares.
	Henry Lewis, Philadelphia	15 shares.
		355 shares.
	W. A. Goodman, Cincinnati	25 shares.
	Elliott, Johnson & Co., Wilmington (352)	350 shares.
		730 shares.

Besides these, we have sold Mr. Graham $50,000 bonds; Mr. James U. Jackson, $25,000; Miss E. T. Latimer, $1,000 more; in all, $76,000 bonds yet to be paid for, the dividend, however, upon the stock of which will be due us. This amounts to 380 shares. You better make this dividend in our name, and let us pay it out when they pay for the bonds. Then Mr. Tome's option for $20,000 bonds and Dr. Du Bois for $4,000 bonds, will carry the dividend if they take them up. Perhaps you better make this dividend also to us, and if they are not paid for we will return it.

Yours truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "49."

WILMINGTON, DEL., *July* 3, 1889.

John Carlisle, treas'r, Cincinnati, O.

DEAR SIR: Your favor 1st with certifs. Nos. 72–'3–'4–'5, for in all 36 shs. Gt. Western M. & M. Co. stock rec'd. The No. 75 certf. should be in name of Fait instead of Tait, as you made in the certf. I crossed the T and made it an F, which I trust meets your approval. Kindly change same on books. In payment for $6,000 Gt. Western M. & M. Co. 1st mtge. 6's and 50 per cent. stock of same at 85, we enclose our check No. 8561, certified on New York city for $5,100. Please transfer 15 shs. stock to name of Henry Lewis, of Philadelphia, Pa., and 15 shs. to our own name. We understand this stock carries div'd payable 15th inst.

Very truly,

(Signed) ELLIOTT, JOHNSON & CO.

55 EXHIBIT "50."

WILMINGTON, DEL., *July* 6 1889.

Mr. John Carlisle, treas'r the Gt. Western M. & M. Co., Cincinnati, Ohio.

DEAR SIR: We enclose you our No. 8564, payable in N. Y. to your order for $850, in payment for $1,000 1st mtge. 6 per cent. bond, the Gt. Western M. & M. Co. and 5 shs. stock. Kindly forward certificate for 3 shs. in name of Miss Elizabeth T. Latimer, and for 2 shs. in our name. This stock is entitled to the div'd, and makes 6 shs. in her name.

Yours truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "51."

Telegram.

(Dated WILMINGTON, DEL.), *July* 11, 1889.

To John Carlisle, room 37, Carlisle building:

Have just given option to new party for a few days on twenty-five thousand, to include the dividends; think he is sure to take them, so wire, requesting you to arrange the matter. Can't tell if send more this week.

ELLIOTT, JOHNSON & CO.

EXHIBIT "52."

WILMINGTON, DEL., *July* 11, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: Your favor 9th inst. enclosing certfs. Nos. 76, 77, 78, 79, 80, 81 and 82, for in all 119 shares Great Western Mining and Manufacturing Co. stock as stated, received, for which we thank you. We note that you expect to leave shortly for the East, and are anticipating with much pleasure a visit from you.

Yours truly,

(Signed) ELLIOTT, JOHNSON & CO.

56 EXHIBIT "53."

WILMINGTON, DEL., *July* 18, 1889.

Thomas Jackson, 602 Washington St.
George Eakins, 616 Chestnut St.
Eliz. T. Latimer, 828 Market St.
Henry Lewis, 238 Chestnut St.
Rev. Geo. W. Du Bois, Keene Valley Po. O., Essex Co., N. Y.
J. G. Kraft, 34 Eutaw house.
John J. Reading, care Jos. M. Gazzam, 714 Walnut St.

EXHIBIT "54."

WILMINGTON, DEL., *July* 10, 1889.

Mr. John Carlisle, treas'r, Cincinnati, Ohio.

DEAR SIR: We saw Mr. Gazzam to-day, and following our understanding with you to take $15,000 back from him at cost and interest at any time by January first next if he would take them, he con-

cluded to do so. You see since we have agreed to support the market, if he had purchased $25,000 outright, and then concluded to sell $15,000, we would have to take them, so we make no new condition and we believe that when they get down in Mr. Reading's box they will not come out again until they are to be paid off. We will probably remit you on Tuesday for these additional $15,000.

We enclose you the dividend check you had drawn for his option. So soon as we remit for the $15,000 we will get you to send instead of it a dividend check to him for $63 and to us for $62. We will see what we can do about the loan and report to you.

Yours truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "55."

WILMINGTON, DEL., *July* 20, 1889.

Mr. John Carlisle, Tr., Cincinnati, Ohio.

DEAR SIR: In payment for $10,000 1st mtge. 6 per cent. 57 bonds Gt. Western M. & M. Co., and 50 per cent. stock of same company at 85, we enclose our check No. 8583 to your order for $8,500.

Please transfer 25 shs. stock to name John G. Reading, of Phila., Pa., and 25 shs. to our own name, and oblige,

Very truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "56."

WILMINGTON, DEL., *July* 22, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: Very sorry to have to report to you by wire to-day of Mr. Gazzam's cancellation of his purchase of $15,000 add't'l Gt. Western's. We made application to-day to a trust Co. here for loan, and they have requested that we leave it for the committee on Friday, when we will report to you.

Yours truly,

(Signed) H. P. SCOTT.

EXHIBIT "57."

WILMINGTON, DEL., *July* 24, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: Your favor of 22d inst. enclosing certf. No. 35 in name of John G. Reading for 25 shares, and No. 86 in our name for 25 shares, in all for 50 shares of the Great Western M. & M. Co. stock, received, for which we are obliged.

We thank you for kindly wishing our speedy success in placing the balance and "mutually concur with you."

Very truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "58."

WILMINGTON, DEL., *July* 29, 1889.

Mr. John Carlisle, treas'r, Cincinnati, O.

DEAR SIR: Your favor 27th inst., enclosing certfs. stock Gt. Western M. & M. Co. No. 88, for 38 shares, name John G. Reading, No. 87 for 37 shares name of Elliott, Johnson & Co., rec'd, for which we thank you. We have not rec'd the div'd checks for this Reading lot. Won't you please send them, $63 to Mr. Reading's order, and $62 to our order, as per our letter 20th inst., and oblige,

58

Very truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "59."

WILMINGTON, DEL., *Aug.* 1, 1889.

Mr. John Carlisle, Cincinnati, O.

DEAR SIR: We have your favor July 29th and have arranged to take for you from the Union national bank on ten-day call note $20,000, giving $25,000 Great Western bonds as collateral. The understanding being that this note shall be paid not later than next January first. We have been compelled, in order to get them to make the loan to give an agreement that in case they are forced to sell the collateral to protect themselves, that we will buy it for at least enough to cover their loan and interest.

Have not been able to sell any Great Western bonds. New bonds are very flat. Will present them whenever there is a probability of selling. Dr. Du Bois will take the $4,000 Great Western so soon as we can sell $4,000 Jacksonville, Tampa and Key West 6's for him, which we think we are certain to do, so we consider the sale to him on his option as good as made.

We had to send to Baltimore for the $25,000 bonds to make the loan and expect them to-morrow, when we hope to be able to remit you.

We fear the Penn Mutual will not be able to make the loan you mention, since we know that they have already agreed to take several hundred thousand dollars' worth of investments more than they have money for.

Yours truly,

(Signed) ELLIOTT, JOHNSON & CO.

59 EXHIBIT "60."

WILMINGTON, DEL., *Aug.* 5, 1889.

Mr. John Carlisle, Cincinnati, O.

DEAR SIR: Your favor 3d inst. containing check for J. G. Reading for $63, and for ourselves for $62, in payment for 1 per cent. quarterly stock dividend, etc., received. We are glad to learn of the reduced cost of coal shipment.

We wrote you fully on the 2d inst. relative to the loan of the Union national bank.

Yours truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "61."

WILMINGTON, DEL., *July* 25, 1889.

Mr. John Carlisle, treas'r, Cincinnati, O.

DEAR SIR: As we telegraphed you to-day, Mr. Gazzam has decided to take the $15,000 on condition that we will take them back any time before January 1st, 1890, at his option. These are the same terms our Mr. Scott mentioned to you when we last had the pleasure of seeing you here. Please transfer 38 shs. stock to name of John G. Reading, and make certf. as of date, as instructed in our letter of 22d before we countermanded it, also transfer the balance, viz.: 37 shs., to our own name.

In payment for $15,000 Gt. Western M. & M. Co. 1st mtge. 6 per cent. bonds and 50 per cent. stock of same company at 85, we enclose our check, No. 8591, for $12,750.

Very truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "62."

WILMINGTON, DEL. *Aug.* 17, 1889.

Mr. John Carlisle, treas'r, Cincinnati, O.

DEAR SIR: In payment for $4,000 Gt. Western M. & M. Co.
60 6 per cent. bonds and 50 per cent. stock of same company at 85, we enclose our check, 8621, to your order for $3,400.

Please have certf. for 10 shs. made in name of Rev. Geo. W. Du Bois, of Keene Valley P. O., Essex Co., N. Y., and the remaining 10 shs. in our name.

We also return the Gt. Western M. & M. Co.'s check, No. 627, for $20. This check is in payment for the July 15th div'd of 1 per cent. on the stock loans with these bonds as per agreement.

In making out the exchange checks, viz.: 2 of $10 each, please make them to Rev. Geo. W. Du Bois' order and to our own, and oblige.

Very truly,
(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "63."

WILMINGTON, DEL., *Sept.* 9, 1889.

Mr. John Carlisle, Cincinnati, O.

DEAR SIR: We are much pleased to hear from you again and to know that you had such an enjoyable trip.

The 10 shares of stock in the name of George W. Du Bois and the 10 shares in our own name, were duly received, as were also the two checks for $10 each in payment for 1 per cent. quarterly dividends on them.

We much regret that we have been unable to place more of the bonds during your absence, but it was not on account of lack of pushing. During the past month we have made over fifty presentations of the bonds, but as yet without success. Mr. Elliott has given an option on part of them to a German banker, and it is probable that if he takes them he will take all that are left.

The Augusta banker has not been able to sell his lot up to the present time, and is begging off on them until the first proximo, which we think we will have to allow.

Very truly,
(Signed) ELLIOTT, JOHNSON & CO.

61 EXHIBIT "64."

WILMINGTON, DEL., *Sept.* 13, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: Your favor 11th inst., received and noted. We have written to Mr. Jackson requesting him, if it be possible, to take up his $25,000 bonds before the first proximo, but see very little prospect of its being done and do not think it will be safe to depend upon receiving any of this money during the present month. We are doing what we can to close out the balance, but have nothing definite now to report.

Mr. Gazzam wrote us today requesting that we stop in and see him relative to a trade. This may mean that he would like the last block that we sold him taken up, as was our agreement if he desired it.

Very truly,
(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "65."

WILMINGTON, DEL., *Sept.* 16, 1889.

Mr. John Carlisle, treas'r, Cincinnati, Ohio.

DEAR SIR: We are still trying to arrange with Mr. Jackson for him to take up his bonds as soon as possible, but just now have nothing definite to report.

We suppose you will declare the regular quarterly div'd on the stock payable on October 15th, and that the transfer books will close on the first proximo, as was done the last quarter. Please advise us that this will be done, and oblige,

Very truly,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "66."

WILMINGTON, DEL., *Sept.* 20, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

DEAR SIR: We thank you for your favor 18th inst. notify-
62 ing us that the regular quarterly dividend of the Great Western M. & M. Co. will be paid on the 15th proximo. We are dickering with our Augusta man trying to get him to take up his bonds before the first proximo, or else deposit $3,000 against them and we to carry them.

As you know, no one in the investment line is doing a thing, so we all seem to be in the same boat. It is a big tide that don't make a turn. Our idea was to send the bonds with the $5,000 he pays to you, so that you might use them for the time.

Very truly yours,

(Signed) ELLIOTT, JOHNSON & CO.

EXHIBIT "67."

MARCH 16, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I send herewith statements of the value of the property of the Gt. Western M. & M. Co., signed by Prof. A. G. Wetherby and approved by Mr. W. A. Goodman, pres. of the Nat. Laf. Bk. this city, and also by Hy. Peachey, vice-pres't of same. I was fortunate in meeting Prof. Wetherby, who is here from North Carolina on a flying visit. All of these gentlemen have visited the property and are familiar with it.

I also send a map and some clippings from a report made several years since to the R. R. Co. Please advise me if you need anything else.

Yours respectfully, JOHN CARLISLE.

EXHIBIT "68."

MARCH 23, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: Will you kindly inform me what are the prospects for placing the bonds of the Gt. W. M. & M. Co., and when you will be able to send some one out to examine the property?

63 As I may have to go East very soon, that is, early in April, a meeting of our company could be called in N. Y. then and the necessary resolutions adopted, and thus time saved.

Yours respectfully, JOHN CARLISLE.

EXHIBIT "69."

MARCH 27, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I beg to acknowledge the receipt of your kind favor of the 25th. I trust your ill success in Philadelphia and New York may not discourage you, and that you may be successful in Baltimore.

It is such a small amount and so good that it seems to me it ought to be secured rapidly. If you could only get the Penn Mutual to start the subscription, it would have a good effect.

If you think I can be of any service, I will come to Philadelphia and try to help you.

Yours truly, JOHN CARLISLE.

EXHIBIT "70."

APRIL 1, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I am in receipt of your kind favor of the 30th ult. I feel confident of your ultimate success in placing our bonds if you will persevere, and that I am sure you would do if you saw the property.

I expect to go East next week and would be glad to meet you in Philadelphia on Monday or Tuesday next. I might possibly assist you in starting the ball rolling.

Yours truly, JOHN CARLISLE.

64 EXHIBIT "71."

APRIL 13, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I neglected yesterday to leave with you the enclosed letter, which you may find of some use.

Please remember that the annual meeting of our company will

be held on Tuesday, April 22, at which time the necessary resolutions relating to the issue of the new mortgage should be adopted. Therefore if you will kindly prepare them in accordance with your views and mail them to me not later than the 19th, I will see that the proper action is taken.

Yours truly, JOHN CARLISLE.

EXHIBIT "72."

APR. 15, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: Herewith please find copy of resolutions I have prepared for the action of the Gt. W. M. & M. Co. at their annual meeting on the 23d.

Please add to them whatever you think may be necessary.

If you think best, we can elect one of the members of your firm a director in the board. I can transfer a few shares of stock to make such person eligible.

Yours truly, JOHN CARLISLE.

EXHIBIT "73."

APR. 16, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I send you herewith a white print of a map on a small scale of the property of the Gt. W. Mining and Manufacturing Co., just prepared by our engineer.

65 I wish you would kindly write me your proposition as we talked when I was with you in Wilmington last Friday, so that I can submit it formally to our board at their annual meeting on the 22nd.

Yours truly, JOHN CARLISLE.

EXHIBIT "74."

APR. 19, 1889.

Messrs. Elliott, Johnson & Co., 612 Market St., Wilmington, Del.:

Letter received. Please wire me name of trust company. Resolutions shall be amended as you suggest.

JOHN CARLISLE.

EXHIBIT "75."

APR. 25, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I am in receipt of your favor of 17th and 18th. I have prepared the resolutions to cover the points you mention. I have also your telegram and will fill in the names of the "Mercan-

tile Trust Co., of Baltimore, Md." We shall leave for Ashland, Ky., to-morrow, and on Monday we will hold our annual meeting, when we shall adopt the resolutions.

Please let me know on receipt of this whether you desire your own attorney or ours to draw up the deed of trust. If yours, I will send you copies of the resolutions. I shall return here on Wednesday morning. I wish Prof. Wetherby could be here in time to go with us.

Yours very truly, JOHN CARLISLE.

EXHIBIT "76."

APR. 21, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: Mr. B. D. Harris, our president, arrived last night. I read him your letters, and he assents to your propositions
66 with this understanding, that you receive subscriptions for the bonds, but none to be delivered unless all are subscribed for within a certain period. How long should the time be for the receiving of subscriptions? I enclose copy of resolution relating to issue of additional stock.

Would it not be a good plan to at once invite such subscriptions subject to the examination by expert? That it seems to me would expedite matters.

Yours truly, JOHN CARLISLE.

EXHIBIT "77."

APR. 24, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I am in receipt of your favor of the 22nd. We shall at once have an attorney prepare all the papers carefully and will send them to Mr. Huey as soon as they are ready.

I have heard nothing from Prof. Wetherby yet. Have you?

Yours truly, JOHN CARLISLE.

EXHIBIT "78."

APR. 25, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I have a letter from Prof. Wetherby, date 22nd inst. He says he has received your letter, and will, as soon as he can be released by the courts as a witness, come to Cincinnati, and proceed to an examination of our property.

I can get the bonds lithographed here very neatly. Have you any suggestions to make as to form and style, or would you prefer to have them lithographed in Philadelphia under your direction?

Yours very truly, JOHN CARLISLE.

67

EXHIBIT "79."

APR. 27, 1889.

Messrs. Elliott, Johnson & Co.:

At the meeting of the directors of the Great Western Mining and Manufacturing Company, held on the 22nd inst., your proposition, embodied in your letter of the 18th inst., undertaking to float the bonds of this company, so that the same should net the company 85 per cent. of the par value thereof, providing 50 per cent. of the par value of the bonds in the stock of the company should also be transferred with said bonds; and also provided that the results of further examination are favorable was presented and accepted, and the secretary was directed to notify you of such action of the directors.

This gives you the exclusive authority to negotiate the sale of the bonds of the company.

Very truly yours, JOHN CARLISLE, *Sec., etc.*

EXHIBIT "80."

APR. 27, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I am in receipt of your favor of the 24th. My suggestions in previous letters were only suggestions, and as you seem to think they are not practicable we are willing to leave the matter entirely in your hands, knowing that you have had much experience in such matters and that if you are not restricted by conditions you will succeed in floating all the bonds.

I enclose herewith an official formal acceptance of your proposition.

At our meeting of the 22nd inst. we increased the capital stock to $350,000. Estimating our business the same as last year, we can pay the interest on $300,000 of bonds, and still continue dividends the same as we are now paying, of 1 per cent. a quarter on the stock or 4 per cent. per annum. That will give the purchasers of the bonds a certain 8 per cent. investment.

I should like to see a copy of your circular before it is circulated, as I may be able to suggest some additions. Prof. Wetherby
68 has not made his appearance yet, although I expect him any day.

Yours truly, JOHN CARLISLE.

EXHIBIT "81."

APR. 29, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I am in receipt of your favor of the 26th and 27th. I will send you a copy of bond and mortgage as soon as our attorney prepares it.

Herewith please find a statement from G. W. Paul, purchasing agent of the C. H. & D. R. R., as to the quality of our coal.

I have a telegram from Prof. Wetherby that he will be here to-morrow.

Yours truly, JOHN CARLISLE.

EXHIBIT "82."

MAY 1, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I have your good letter of the 29th. Prof. Wetherby is now at Peach Orchard. I think he will return by Sunday when he will prepare his report and I hope will be able to mail it to you by Monday.

We will have the mortgages printed. I will send you letters from parties requesting us to estimate for them on Peach Orchard coal that I think will satisfy you of the demand for it. I will also prepare for you the statement of our corporation as you request; and all the other suggestions shall be attended to. I will send you the map by Saturday. Our attorney has prepared the form of bond and mortgage which I have sent to our president, Mr. B. D. Harris, for his approval and correction. As soon as I hear from him, will send copies of same to Mr. Huey and will notify you. In regard to the Bank of Louisville, my information is that it is a small con-
69 cern doing but little business. The statement shows that. On general principles I would not wish to hold stock in a bank whose deposits amount to less than one-half the capital. It ought to be reversed. I do not see how such a bank can make any money. Under the laws of Kentucky, stockholders are not liable for the debts of the company. There is no personal liability.

Yours truly, JOHN CARLISLE.

EXHIBIT "83."

MAY 2, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I have sent you by express a photograph view of the big coal train that came over the C. & O. railway a few weeks ago. It is not very distinct, but will give an idea of the length of the train.

I am having the words of the bonds set up by the lithographers, the script matter to be put in after the form of bond has been approved. That will save some time.

Yours truly, JOHN CARLISLE.

EXHIBIT "84."

MAY 4, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: Prof. Wetherby has returned from his inspection of the property of the Great Western Mining and Manufacturing Company. He has requested me to say to you that he will have his report ready to mail you Monday evening next.

I enclose you letters from parties desiring us to bid on Peach Orchard coal for them which I think will satisfy you that we will have no difficulty in disposing of all we can mine. To fill these orders, or rather requests, would aggregate about 400,000 tons in addition to our present output per annum, or say a total of 2,000 tons daily.

We can underbid any other coal company by 20 cents per
70 ton and still make a profit of 20 cents per ton. On Monday will send you the copies of maps and also a few small photographs of the tipples, houses, railroad, etc., at our mines. These photographs were taken six years ago and are somewhat imperfect but will give you some idea of our improvements.

Yours truly, JOHN CARLISLE.

EXHIBIT "85."

MAY 6, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: Prof. Wetherby has just mailed you his report, which I trust may be satisfactory. The endorsement of the value, you will see, is not signed by the same parties who endorsed his previous statements, for the reason that Mr. Goodman was absent and Mr. Peachy is ill. Both Mr. Murdock and Mr. Rockwell are just as familiar with the property. If you desire it, I can get the other endorsements in a day or two.

I mailed to-day to Mr. Samuel B. Huey, Drexel building, Philadelphia, as you directed, the form of bond and copy of trust deed. Will you kindly see him at once and hurry up the examination and opinion, and then please let us know when you will want Mr. Harris and I to execute the deed. Just as soon as I hear from Mr. Huey I will have the bonds lithographed. The body of the bond will be engraved by to-morrow and all that will remain to do is to fill in the script.

Don't you think it would be advisable to print the trust deed, form of bond, Wetherby's report and the trusts in a pamphlet?

Yours truly, JOHN CARLISLE.

EXHIBIT "86."

MAY 8, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I am in receipt of your favor of the 6th. I
71 have made no arrangement with the Mercantile Trust Co., of Baltimore, to act as trustee, thinking that possibly that you had done so. I have to-day written them a letter, a copy of which letter you will find enclosed. Will you kindly follow up my letter and personally see the officers in relation to it?

As soon as Mr. Huey passes upon the papers, I will be much obliged if you will hand these to the trust company to be passed upon by their attorney.

I have sent you by Adams express, 75 copies of the small map, and also some photographs, views which I think you will find interesting. By this time you have undoubtedly received Prof. Wetherby's report, and Mr. Huey must have the form of bond and trust deed which I mailed him on Monday. I inclose another letter of inquiry for Peach Orchard coal. Do you want any more?

Yours truly, JOHN CARLISLE.

EXHIBIT "87."

MAY 11, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I have your favor of the 9th. I did not overlook sending you the statement of earnings and expenses. The delay occurred because I had to send to our bookkeeper at Ashland, Ky., for them. I have just received them and send herewith. They are for five years. The present company took hold of the property in November, 1883, and they comprise all the time we have been operating the mines. The first three years do not make a very favorable showing of net earnings, as entry work was being driven and new mines opened, which was charged to operating expenses. This was particularly so in 1886. I would suggest that you put in your circular only the statements from 1887 and 1888.

As soon as the trust deed is executed I will see that it is promptly recorded. As soon as I hear from Mr. Huey and the Mercantile Trust Company, I will have the papers printed in a few hours. One of the copies I will execute here as secretary and send to Mr. D. B.
Harris, Brattleboro, Vt., for his signature, then submit to the
72 trust company and at once have it recorded. I find I can get the pamphlet printed just as quick as to have the 300 copies of the trust deed printed which you want. In printing Wetherby report I shall omit that portion relating to cost of mining and improvements needed. Hope I shall get the papers back by Monday.

Yours truly, JOHN CARLISLE.

EXHIBIT "88."

MAY 13, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I am in receipt of your good letter of the 10th. Very glad to hear that our papers are approved. I have just sent you a night telegram: "Please wire me if I can proceed with printing deed and form of bond without waiting for formal approval." I take it from what you say that there will be little if any correction to be made, and I thought this telegram might save 24 hours. I have the type set up, and as soon as I hear will have several copies printed and will at once start with them to Philadelphia, where Mr. Harris will meet me and we can execute the papers, after which they can be taken to the trust company to see and I can bring them directly out to be recorded. When I start will telegraph you, and would like one of you to meet me at the depot in Wilmington. I will probably pass there about 5 p. m., either on Thursday or Friday. Reuben Tyler, of this city, is our attorney who drew the papers. He will certify that they are legally drawn. The certificate of the title we will have prepared by the clerk of the court. I have written to Mr. B. D. Harris to send you a list of the holders of present bonds, as they are mostly held on collateral for loans we obtained for the company. We shall certainly expect to rebate interest on all bonds sold previous to July 1. (Partly rubbed out.)

Yours truly, JOHN CARLISLE.

73 EXHIBIT "89."

MAY 16, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I am in receipt of your very good letter of the 14th. I have carefully gone over the proof and made all the corrections as suggested by you and the Mercantile Trust Co. I fixed the date of the old mortgage January 1, 1884. Put in the two extra articles. I retained the word "first" because there will be no difficulty in retiring the 6,000 bonds, as they are practically in our control, as Mr. B. D. Harris has undoubtedly written you. The mortgage should certainly be filed with the trust Co. after it is recorded. We should desire that. I have dated the bonds June 1, and changed the date in the trust deed.

Your circular is very good. I have made but slight changes in it. I suggest you add Mr. Goodman's last note to your circular. My reasons for wishing the term of coal mining left out of Wetherby's report was, if that should get into the hands of any of our customers on competition, it might give us trouble. I have no objection to your putting it in your circular, as I shall cut it out of my

pamphlet. The bonds will not be ready for ten days. It will take that time to get out the map you wish. The trust deed will be printed by Saturday. I will bring it East with me, arriving in Philadelphia Monday morning, when Mr. B. D. Harris will meet me to execute it. I can take it to Baltimore this afternoon. Will you meet me in Philadelphia Monday morning? Shall it be at Hotel Lafayette?

Yours truly, JOHN CARLISLE.

EXHIBIT "90."

MAY 18, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I wired you this morning that I would be in Philadelphia Monday morning at Hotel Lafayette. I have the trust deed printed and have sent you by Adams Express Company 100 74 copies. There is an error on the first page discovered after all were printed. In one place is July 6th; it ought to be June 1st. That can be scratched out and altered. Mr. B. D. Harris will meet me in Philadelphia at 10:15 Monday morning to execute the deed. I hope one of you can be there by that time to see if any changes should be made. Please wire me to Philadelphia on receipt of this if you will be there and at what time. I shall leave here to-morrow morning and arrive in Philadelphia at 7:45 Monday morning. The bonds will all be ready by the 27th.

Yours very truly, JOHN CARLISLE.

EXHIBIT "91."

JUNE 5, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I have just been able to reach Cincinnati, having, as you know, started for this place last Saturday. Herewith please find certificate No. 747 for 125 shares of stock of the Gt. Western Mining and Mfg. Co., par value $125,000. I am much obliged for your telegram. I presume your Monday letter will arrive tomorrow. I hardly expected it to-day, as the mails are so badly disarranged. Mr. B. D. Harris returned me your letter relating to the listing of our securities. He does not take kindly to the suggestion because he can not understand it as I do. But I will say this, if I can not get him to consent to our company supporting the market I will do so individually, and will arrange this matter with you when I again see you, which will be so soon as I get the old mortgage cancelled. You may therefore make your sales and preparations to list the securities as soon as all are sold.

Yours very truly, JOHN CARLISLE.

75 EXHIBIT "92."

JUNE 6, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

GENTLEMEN: I am in receipt of your favor of the 3rd inst., covering your c'k for $10,200, being the proceeds of 12 Gt. W. M. & M. Co. bonds sold.

Inclosed please find certificate of stock of Gt. W. M. & M. Co., No. 48, for 25 shares in name of J. G. Kraft. Upon delivery of certificates please have parties sign receipts for same and send to me.

The C. H. & D. R. R. Co. have ordered from our company Peach Orchard coal to supply Indianapolis, on account of strike in the Indiana mines from which they have heretofore received their supply.

We have let the contract for building our new store of brick and stone, 28 by 80 feet. Next week we shall commence the erection of 100 houses.

Yours very truly, JOHN CARLISLE, *Treas.*

Will my letters be sufficient receipt to you, or do you wish me to send separate receipts for each remittance?

J. C.

EXHIBIT "93."

CINCINNATI, O., *May* 13, 1889.

A meeting of directors was held this day in Cincinnati, O., at the office of John Carlisle, at 11 o'clock a. m. There were present, Messrs. Richardson, Hinsdale, G. W. Carlisle and John Carlisle; absent, Messrs. B. D Harris, G. D. Harris and Holden.

In the absence of the president, Vice-President Richardson occupied the chair. The minutes of the last meeting of directors, held Apr. 22, 1889, were read and approved. John Carlisle reported that in compliance with the action of the board at the last meeting he had employed counsel to prepare bond and deed of trust, which had been submitted to the president and approved by him. He also presented a written communication from the stockholders of the company, which was read and is as follows:

76 "Proposition of stockholders of the Great Western Mining and Manufacturing Company to the directors of said company:

"Whereas the directors of the Great Western Mining and Manufacturing Company have taken steps to borrow the sum of $300,000, to be used in payment of existing indebtedness of the company and to provide additional working capital, etc., and have authorized the president and secretary to execute bonds for said amount, and to negotiate the same at the best price obtainable; and

"Whereas, we are informed that it will probably be possible to find purchasers for said bonds at the price of 85 per cent. of the par value thereof, provided that stock of the company, to the extent of 50 per cent. of the par value of the said bonds, shall also be transferred to *the* negotiate the same at the best price obtainable; and

"Whereas, it is deemed to be expedient to issue any new stock of the company for such purpose; and desiring to do all we can to assist the directors in procuring said loan and the sale of said bonds:

"We therefore make this proposition to the directors of the company in reference to the sale of stock held by us in said company, to the purchasers of said bonds, to-wit:

"We will sell the several purchasers of said bonds of the company, stock of the company belonging to us, in the amounts set opposite to our names, respectively, and will furnish to the secretary of the company certificates of said stock, assigned in blank, to be by him delivered to said purchasers of said bonds, upon the understanding and agreement that we are to receive the sum of $50 for each share of stock so sold by us, out of the money paid for said bonds, and said secretary shall act as our agent in receiving said amounts, and shall pay us the same, before the company shall be entitled to have the remainder of the money paid for said bonds by the purchasers thereof.

"This action is not to be construed as a proposition to sell said stock to the company, but is to be treated and regarded as a sale of stock directly to the purchasers of said bonds, to be paid for by them to us, and the payment by them to the secretary of this company for said bonds, shall be regarded as a payment to us for said
77 stock, to the extent necessary to pay us therefor upon the terms above stated.

"In testimony whereof, we have hereunto set our hands, on this third day of May, 1889.

"B. D. Harris	450 shares
G. D. Harris	450 shares
John Carlisle	336 shares
Geo. S. Richardson	39 shares
G. W. Carlisle	225 shares
Total	1,500 shares"

After full consideration of the proposition, the same was accepted and the secretary was authorized to act as the agent for said stockholders, in the proposed sale of their stock and the collection of the purchase money therefor, and directed to turn over the net proceeds of the sale of bonds into the treasury of the company.

The board then adjourned.

JOHN CARLISLE, *Sec'y.*

EXHIBIT "94."

Treasurer's Account.

(Ledger "B," page 396.)

DR.

1890.				
Ap'l	1.	To sinking fund bond acc't	180	$262,000.00
Ap'l	1.	To surplus earnings account	180	2,242.42
Oct.	31.	To bond, 38	182	38,000.00
Oct.	31.	To surplus earnings	182	557.99
				$302,800.41

Treasurer's Acc't.

CR.

1890.				
Ap'l	1.	By bond expense	181	$116,666.00
		By 1st mortgage bonds	181	60,000.00
		By John Carlisle, treas	181	30,000.00
		By surplus earnings, J. C.	181	1,909.16
		By sundries, J. C.	181	26,572.94
		By bond expense	182	5,700.00
		By bills payable	182	44,491.96
		By interest		3,392.61
78		By surplus earnings	182	8,779.50
		By John Carlisle, treas.	331	5,288.24
				$302,800.41

March 31, 1890.

180	396	Treasurer acc't.	$262,000.00	

To sinking fund bond account.

		For 262 bonds sold from June, 1889, to March 7, 1890, No. 1 to No. 263		$262,000.00
182	396	Treasurer acc't.	38,000.00	

To surplus earnings acc't.

		For amount of int. accumulating on the above bonds sold		2,242.42
182	396	Treasurer acc't.	38,000.00	

To bond account.

		For amount of 38 bonds sold by Elliott, Johnson & Co., from No. 263 to No. 300.		38,000.00
182	396	Treasurer acc't.	557.99	

To surplus earnings.

		For amount of interest accumulated interest on bonds.		557.99

March 31, 1890.

CR.

	396	Bond expense.	$116,666.00	

To treasurer acc't.

		For commission p'd Elliott, Johnson & Co, for selling 262 bonds, No. 1 to No. 262.	$39,300.00	
		P'd Prof. Wetherby for as expert and examining property	350.00	

79		P'd Mercantile Trust & Deposit Co., of Baltimore—certifying 300 bonds	300.00	
		P'd S. B. Huey, of Philadelphia, passing on deed of trust	100.00	
		P'd notary for acknowledging signature to bonds	4.00	
		P'd registering bonds	60.00	
		P'd lithographing bonds	196.00	
		P'd blue print maps	10.00	
		P'd E. Vernon, drawing papers, etc	480.00	
		P'd Henderson, Achert & Co., printing	20.00	
		P'd A. H. Pugh, printing	91.00	
		P'd R. Tyler, preparing deed of trust	250.00	
		P'd sundry telegrams	5.00	
		P'd traveling expenses	500.00	
		Returned to stockholders 1,500 shares of stock to issue to new bondholders, as per agreement, May 3, 1889	75,000.00	
				$116,686.00
	396	First mortgage bonds	$60,000.00	
		To treasurer acc't.		
		Redemption of 60 bonds		$60,000.00
		March 31, 1890.		
		Cr.		
181	396	John Carlisle, treas	$30,000.00	
		To treasurer acc't.		
		For amount of advance Sept. 9, 1889	$7,500.00	
		For amount of advance Dec. 1, 1889	10,000.00	
		For amount of advance Jan. 1, 1890	7,500.00	
80		For amount of advance Mar. 20, 1890	5,000.00	
				$30,000.00
	396	Surplus earnings	$1,909.16	
		To treasurer acc't.		
181		For amount of interest on bonds	$1,500.00	
		Graham. Interest on advance made by Graham	409.16	
				$1,909.16
	396	Sundries to treasurer acc't		26,572.94
181		John Carlisle, to paid out of proceeds of bonds and balance due John Carlisle, Jan. 1, 1889, and int. 1 year	5,416.37	
		John Carlisle, treas. Amount paid out of proceeds of bonds, balance due John Carlisle, treas., Jan. 1, 1889, and int. 1 year	21,156.57	
	396	Bond expense		$5,700.00
		To treasurer acc't.		
181		For am't of com'n 38 bonds sold by Elliott, Johnson & Co.		$5,700.00

March 31, 1890.

Cr.

	Bills payable		$44,491.96	
	To treasurer acc't.			
182	For amount of four notes given to John Carlisle in 1889 and taken up by treasurer:			
81	1st note		$12,720.00	
	2d note		12,000.00	
	3d note		12,771.96	
	4th note		7,000.00	
				$44,491.96
396	Interest		$3,392.61	
	To treasurer acc't.			
	For amount of interest on the above four notes:			
	On $12,000.00		$1,440.00	
	On 12,771.96		1,532.61	
	On 7,000.00		420.00	
				$3,392.61
396	Surplus earnings		$8,779.50	
	To treasurer acc't.			
	For amount of commission on coal sales for 1888–1889, 175,590 tons, at 5 as salary			$8,779.50
396	John Carlisle, treas		$13,288.24	
	To treasurer acc't.			
	For amount of the balance of treasurer turned into working capital			$5,288.24
331	1st mortgage bonds:			
	For amount rec'd for redemption of old bonds not sold; there were 52 old bonds and 8 bonds were retained for working capital—par value, $8,000. These 8 bonds were given up to be cancelled, and the par value, $8,000, trans. to working capital			8,000.00
82	EXHIBIT "95."			
	Sinking Fund Bond Acc't.			
	(Ledger "B," p. 396.)			
1890.				
Ap'l 1.	By treasurer	181		$262,000.00
Oct. 31.	By treasurer	182		38,000.00
	March 31, 1890.			
396	Treasurer acc't		$262,000.00	
	To sinking fund bond acc't.			
	For 262 bonds sold from *from* June, 1889, to March 7, 1890, No. 1 to No. 263			$262,000.00
396	Treasurer acc't		$38,000.00	

To bond acc't.

For amount of 38 bonds sold by Elliott, Johnson & Co., from No. 263 to No. 300 ..... $38,000.00

EXHIBIT "96."

Bond Expense Acc't.

(Ledger "B," p. 396.)

1890.					
Ap'l	1.	To treasurer	180		$116,666.00
Ap'l	1.	To sundries	181		1,504.12
Nov.	1.	To John Carlisle	230		275.10
Oct.	31.	To treasurer	182		5,700.00
180	396	Bond expense		$116,666.00	

To treasurer acc't.

		P'd commission to Elliott, Johnson & Co., for selling 262 bonds, Nos. 1 to 262	$39,300.00	
83		P'd Prof. Wetherby's fee as expert and examining property	350.00	
		P'd Mercantile Trust & Deposit Co., of Baltimore, certifying 300 bonds	300.00	
		P'd S. B. Huey, of Philadelphia, passing on deed of trust	100.00	
		P'd notary for acknowledging signature to bonds	4.00	
		P'd registering bonds	60.00	
		P'd lithographing bonds	196.00	
		P'd blue print maps	10.00	
		P'd E. Vernon, drawing papers, etc	480.00	
		P'd Henderson, Achert & Co., printing	20.00	
		P'd A. H. Pugh, printing	91.00	
		P'd R. Tyler, preparing deed of trust	250.00	
		P'd sundry telegrams	5.00	
		P'd traveling expenses	500.00	
		Returned to stockholders 1,500 shares of stock to issue to new bondholders, as per agreement, May 3, 1889	75,000.00	$116,666.00
	396	Bond expense	$1,504.12	

To sundries.

		John Carlisle, 1 year's interest to Dec. 31, 1889, on $5,109.77, due Jan. 1, 1889, at 6 per cent	$306.58	
84				
180		John Carlisle, treas., 1 year's int. to Dec. 31, 1889, on balance of $19,959.03, due Jan. 1, 1889, at 6 per cent		1,197.54

November 30, 1890.

	396	Bond sale	$275.10	
		To John Carlisle for the following expenses incurred while selling bonds:		
		Registering letters in Boston	.10	
		Sept. 6, Elliott, Johnson & Co., to pay listing bonds	200.00	
		Sept. 22, Elliott, Johnson & Co. to pay listing bonds	25.00	
		Sept. Elliott, Johnson & Co., registering bonds	50.00	$275.10

March 31, 1890.

396	Bond expense	$5,700.00	
182	To treasurer acc't.		
	For amount of com. on 38 bonds sold by Elliott, Johnson & Co.		$5,700.00

EXHIBIT "97."

First Mortgage Bonds.

(Ledger "B," 366.)

Dr.

1890.				
Ap'l 1.	To treasurer J. C	180		$60,000.00
				$60,000.00

85 Cr.

1888.			
Jan. 1.	By am't trans. from ledger "A"	345	$32,000.00
1890.			
Jan. 1.	By bills payable J. C.	181	20,000.00
Dec. 31.	By John Carlisle, treas	331	8,000.00
			$60,000.00

March 31, 1890.

(Journal "B," p. 180.)

Dr.

366	First mortgage bonds	$60,000.00	
	To treasurer acc't.		
	Redemption of 60 bonds		$60,000.00

(Ledger.)

345	John Carlisle, treas	$32,000.00	

(Journal "I," p. 357.)

To Gt. W. M. & M. Co. 1st mort. bonds:		
Jan. 1, 1884, am't proceeds sale 10 bonds to B. D. Harris	10,000.00	
Ap'l 12, am't proceeds sale 1 bond to J. C. Holden	1,000.00	
July 9, am't proceeds sale 1 bond to B. D. Harris	1,000.00	
Sept. 25, am't proceeds sale 10 bonds to B. D. Harris	10,000.00	
May 1, 1885, am't proceeds sale 10 bonds to John Carlisle	10,000.00	
		$32,000.00

(Journal "B," p. 181.)

March 31, 1890.

366	Bills payable	$20,000.00	

86 To first mortgage bonds.

	For amount of notes paid by bonds Cheshire Savings Bank Int.	$15,000.00	
	O. C. Phelps	5,000.00	
			$20,000.00

December, 1891.

366	John Carlisle, treas	$13,288.24	

To treasurer.

For amount of the balance of treasurer turned into working capital		$5,288.24

(Journal "B," p. 331.)

1st mortgage bonds: For amount rec'd for redemption of old bonds not sold. There were 52 old bonds and 8 bonds were retained for working capital, par value $8,000 These 8 bonds were given up to be cancelled, and the par value of $8,000, transferred to working capital	8,000.00

EXHIBIT "98."

John Carlisle to B. D. Harris.

CINCINNATI, *Feb.* 2, 1888.

MY DEAR SIR: I spent yesterday in Ashland with our books, and here is the result:

	Net earnings of mining Co. for 1887	$10,359.22
	Net earnings of store for 1887	7,301.52
87	Net earnings of coal bot. for C. H. & D. R. R.	4,108.34
		$21,760.08

Of course, you will understand that I *charged all of the expenses I could to construction acc't.* We will do much better this year, if we can only get the cars.

The detailed report will be sent you in a few days.

John Carlisle to B. D. Harris, N. Y.

CINCINNATI, *Feb.* 27, 1889.

* * * I have written the prest. of the Penn Mutual of Philadelphia, whom I know, in regard to the loan. If he answers encouragingly, I shall stop at Philadelphia when I go East to see him. I shall start next Tuesday night for N. Y. * * *

J. C. to B. D. H.

CINCINNATI, *M'ch* 16, 1889.

* * * I have heard nothing from you in reply to my letter from Philadelphia. Have wired, but got no reply. I will send Elliott, Johnson & Co. such documents as I have, but Vernon has the tracing map of our property and copy of charter, which I have not.

I have sent them a statement of value of the land at $300 per acre, signed by Prof. Wetherby, Mr. Goodman and Mr. Peachey, of the Nat. Lafayette bank.

B. D. Harris to John Carlisle.

N. Y., *M'ch* 20, 1889.

While I am not entirely sure that all the papers you mention were sent to Elliott & Co., I think they were. The C. H. & D. tests I remember and there were quite a number of other papers and letters.

I have no doubt all that Vernon had, as I asked for everything he had showing the property, quality of the coal, etc.

I did not see Vernon at all, left a note the first time I called stating what I wanted, and the last time I found the papers all ready for me. I called three times and he was out each time.

88 B. D. H. to J. C.

N. Y., *M'ch* 24, 1889.

Meanwhile I hope Elliott & Co. will put the coal matter through. If you get one of them out to P. Orchard, I think it will result in success.

J. C. to B. D. H.

APR. 1, 1889.

I enclose letter from Elliott, Johnson & Co. Although not encouraging, I think there is a gleam of hope in it. I have written them that I felt confident they would succeed if they would persevere, and I know they would do that if they only saw the property.

I said I would meet them in Philadelphia next Monday or Tuesday, if they asked, and possibly I might help them start the ball rolling. I think now is the time to offer additional inducement, either in giving stock or a guarantee to the one who subscribes the first $25,000.

J. C. to B. D. H.

APR. 6, 1889.

I am daily expecting a letter from Elliott, Johnson & Co. If it comes tomorrow and is favorable I will leave to-morrow, Sunday night, for Philadelphia. If I do I will wire you. I hope it will not be necessary for you to start on Wednesday morning, because I may want you to come to Philadelphia Tuesday.

J. C. to B. D. H. at Minneapolis.

CINCINNATI, *Apr.* 13, 1889.

In my hurried letter yesterday, I do not know that I made matters plain. It is this: Messrs. Elliott, Johnson & Co., about one year since placed, with the aid of Messrs. Fisk, Hatch & Co., of N. Y., the bonds of the Shawnee Coal Co., of this State, who are mining 2,000 tons per day. The bonds were sold at a discount but were sugared with an even amount of stock—dollar for dollar.

They were confident if we would agree to this that they alone could float the loan. *That would mean doubling our stock, to which I strongly objected. At last I agreed, subject to your approval to increase the capital stock to $350,000 or $400,000* and give $150,000 of stock with the bonds.

89 J. C. to B. D. H.

APR. 24, 1889.

I have a letter from Elliott, Johnson & Co., saying: "We are very willing to have your attorney prepare the papers, but wish Mr. S. B. Huey of Drexel building, Philadelphia, to pass upon them and I have so written him. Won't you have your lawyer write him giving papers when so drawn?

I have been engaged with Mr. Tyler all the afternoon, giving him all the information relating to the transaction and all the points are talked over. He will very carefully prepare the papers. Shall I send them to you when they are ready for you to examine?

J. C. to B. D. H.

APR. 25, 1889.

"I had a letter to-day from Wetherby saying he had received instructions from Elliott, Johnson & Co. to go to Peach Orchard and make a thorough examination of our property," and an exhaustive report of the quality and amount of coal, the nature and probable value of the present improvements, total value of property, availability, etc., as security for $300,000 bonds, the market, etc., and see Mr. Carlisle as soon as possible and take instructions in this line from him."

He says he expected to have been here Tuesday, but, unfortunately, as he was about to start he was detained by the court,

that he will try to get out of the court at once. I wired him to come at once—very urgent. I have another letter from Elliott, Johnson & Co., date 23rd, saying: "Your favor of 21st is received and is now receiving our attention. We will report you shortly."

B. H. D. to J. C.

N. Y., *Apr.* 27, 1889.

Yours of the 25th is received and I am glad to learn that you have heard from both Wetherby and Elliott & Co., both of whom seem to be in earnest about the business. As Elliott & Co. ask for "an exhaustive report" including *list* and *value* of *personal property*, it seems to me to be important that you should be with Wetherby on the spot to point out every article of personal property,
90 as well as the realty, and see to it that the proper valuation is put upon it, so that the aggregate shall come up to and correspond with the statements that have been already made about these values. This seems to be our *one chance* and we *ought to omit no effort to make our showing complete and satisfactory*. Elliott, too, I notice, asks for the value of coal lands we own. It seems to me a proper standard, or comparison, can be found in the Youghiogheny coal district, where land having coal deposits similar in quality to ours and certainly of no better quality, sells readily for $150 to $500 per acre, according to location, either near or remote from railroad transportation, and we certainly have the advantage over Pennsylvania mines in cheapness of mining and in nearness and certainty of market—in other words, we can make money (where we have perfected facilities for handling our coal) at prices that would run the Youghiogheny mines in debt, and we can reach Cincinnati and down river markets in low water and during coal famine and high prices when they can not.

Wentherby ought to consider and report upon all these points, so we may get the full benefit of all favorable conditions. He can not help making a strong and convincing report, it seems to me.

This, of course, will take a little time, but the sooner it is pushed to a finish the better.

J. C. to B. D. H.

CINCINNATI, *Apr.* 27, 1889.

I have yours of the 24th. I enclose letter received to day from Elliott, Johnson & Co. and a *copy of my official acceptance of their* proposition. I believe they can do much better if not hampered with conditions.

I *also enclose a proposition of the stockholders, which Mr. Tyler carefully prepared so that we could legally* take the $75,000. The company can not legally buy its own stock and re-issue it. If bought by the company, it must be cancelled.

If you approve, please sign and have your brother sign, and return to me when we will sign it, then I shall have a meeting of the board here and accept the proposition.

B. H. D. to J. C.

N. Y., *Apr.* 26.

91 Yours of 24th duly received. Hope Wetherby will turn up promptly as I presume he will or has. After the papers are prepared, I would like to see them before they are submitted to Elliott & Co.'s attorney.

J. C. to B. D. H.

CINCINNATI, *Apr.* 30, 1889.

Weatherby arrived this morning and I have been with him all day going over the matter and giving him all the points I could think. He has made full notes of everything. He will go to Ashland on the night train, taking Chattaroi train for Peach Orchard to-morrow morning, looking at mines in afternoon. On Tuesday, he will ride all over the property. Friday he will examine big vein and will put in the remainder of the week. If he wants me he will telegraph and I will go up, but he thinks he has all the information I can give him. He will return here early next week and prepare his report. I send herewith the resolutions as corrected by Mr. Tyler.

J. C. to B. D. H.

CINCINNATI, *May* 2, 1889.

Herewith please find copy of mortgage as prepared by Mr. Tyler. It is substantially copied from the old sinking fund bond of the Chattaroi Ry. with such modification as will fit our case.

Please examine carefully and telegraph me on Saturday whether the mortgage and form of bond is satisfactory. If so, I will immediately send copies to Elliott, J. & Co. By telegraphing, at least three days' time will be saved.

J. C. to B. D. H.

MAY 3, 1889.

When I mailed my letter of this date to you an hour ago, I had not read the form of bond you sent me. I now find that you mention in that bond 4,000 acres of coal land as the amount of land owned and conveyed by the company. How is this? I supposed we owned and had the mining right on fully 6,000 acres. The public statements made by us heretofore have claimed 6,000 acres. It won't do to put out contradictory statements on so important a point.

92 J. C. to B. D. H.

CINCINNATI, *May* 4, 1889.

I am in receipt of your telegram of this date which is somewhat of a disappointment to me. Tyler and I worked over those papers constantly for a week and I felt certain you would approve them, but as two heads are better than one, naturally three heads are better than two and I fear Tyler and I have made some mistake.

I wish it had been possible for us to have been together in drawing up the papers as much time could have been saved, which is very essential.

E. J. & Co. are in the humor to push the selling of our bonds, and with their enthusiasm and their class of clients, I feel confident of their disposing of the whole issue in a short time. I am only afraid their ardor will cool off before we are ready.

I wired you yesterday that Wetherby had returned. He came back highly pleased. He saw everything and seemed to be as familiar with the property as I am. He will have his report ready to send to E. J. & Co. by Monday. I have seen the rough sheets of it and find it everything we could wish and more. I warned him against being influenced by his personal friendship for me, but to give a free, honest, and unbiased opinion of it, which he asserts he has done.

J. C. to B. D. H.

CINCINNATI, *May* 6, 1889.

I have your letter of the 3rd. I enclose copy of Wetherby's report. The new stock will be issued as soon as I get the new stock book and will be dated April 23rd so as to take precedence of sale of bonds or stock, that I had intended.

The form of bond was copied from the old bond which called for 4,000 acres, as that is about the amount we own in fee simple, 2,000 acres are mineral rights and it is so stated in Wetherby's report.

Barges are included in personal property. I shall not copy any of the resolutions or minutes in the books until after the next meeting of our board, and shall have them drawn with the utmost care.

I shall send on the trust deed and form of bond to E. J. &
93 Co.'s attorney with the changes as you suggest, except as to quantity. If they desire the change as to quantity we can do so.

I will let you know as soon as they are ready for us to sign deed.

J. C. to B. D. H.

CINCINNATI, *May* 7, 1889.

In addition to the letters and report sent you yesterday, I was very busy completing the mortgages and form of bond to send to

Mr. Huey, the attorney of Elliott, Johnson & Co., as well as writing to E. J. & Co.

Our new stock book will be ready the first of next week, when I will fill out the certificates. In what shape do you and your brother want yours, that is, do you want them in 10, 20, 50 or 100 shares each?

I am having the body of the bond prepared, but it can not be completed until Mr. Huey decides on the form of bond, and the lithographer tells me it will take at least two weeks after that before they can deliver them.

If we get the form back by next Monday, the 13th, it will be about the 1st of June before we can have them to sign.

B. H. D. to J. C.

CINCINNATI, *May* 7, 1889.

Yours of the 6th covering Prof. Wetherby's report is just received and read. Wetherby's report is certainly appreciative and ought to satisfy E. J. & Co. and their customers of the great value of the property and the ample security it furnishes for the proposed bonds. I presume it will and if they have the standing and influence with investors we have been led to believe, they ought to make short work in placing this loan. I shall hold myself in readiness to respond promptly to any call for my presence to aid in carrying out our part of the scheme. I hope at an early date to learn that E. J. & Co. are moving with vigor. When will the bonds be ready?

B. H. D. to J. C.

[illegible] 9.

Yours of 7th is just received. I do not see why all our preliminary work is not now done and ready for action on the part of Elliott & Co. I think the facts are presented in good shape and hope they
94 will prove sufficient to secure the prompt success of the loan. Please keep me constantly advised of all progress.

J. C. to B. D. H.

CINCINNATI, *May* 11, 1889.

I am in receipt of yours of the 9th. Our preliminary work is now done. What remains is to have the mortgage and form of bond passed on by Mr. Huey and the attorney of the Trust Co. Until that is done I can do nothing more.

When I receive those papers I will have them printed (it is already set up in type) and will send or bring east with me to have executed. Immediately afterwards I will have it put on record in Lawrence county and sent to the trustee.

I am having Wetherby's report set up. Have had an engraving made of the small map, and as soon as I get back the mortgage and

form of bond, have 500 pamphlets printed very quick. I shall omit in the pamphlet that portion of Wetherby's report relating to cost of mining and improvements needed.

The new stock book will be ready by Wednesday. The bonds will hardly be ready before June 1st. If I decide to bring the mortgage east can you meet me in Philadelphia to execute it?

B. D. H. to J. C.

MAY 13, 1889.

I shall go to N. Y. the last week in this month to bring my family home by special car, leaving the city not later than the 30th and a day or two earlier, if convenient. Now if I have to meet you about that time to execute the papers, etc., as seems likely, I want you to arrange, if possible, for some time between, say the 24th and 29th, and let me know as soon as possible the exact date and where to meet you.

I suppose the bonds can be printed and ready before that time and if Elliott & Co. are as full of zeal and energy as they pretend, they ought to be prepared for decisive action as soon as we can give them the bonds. If wanted I can bring on the old bonds held by us, for instant delivery. These, of course, will have to go to
95 the trustee to be cancelled and have the old mortgage discharged. We (*i. e.* myself and family) have 21 of the 22 bonds actually sold. The other bond was sold by Holden and he will have to notify the party holding it, that it has been called in for payment.

Later. Yours of Saturday just received, in which you say you fear the papers will not be ready for execution before June 1, or later. If this turns out to be so, then I will have to meet you after bringing my family home, but perhaps it can be done before.

B. D. H. to J. C.

MAY 14, 1889.

Yours with inclosure is received. I have written Elliott, Johnson & Co. that you had asked me to inform them "when and how the present bonds (60,000) on Peach Orchard property could be got in for cancellation, etc., etc., that a large part of the bonds were held as collateral for loans that can be paid at any time and that I have no doubt the whole issue can be delivered by July 1 and be retired on payment, in cash, of their face value and accrued interest, so there will be no delay or trouble on that score." I said nothing about exchanging, for that can not be done, and I thought best to be silent on that point. I will meet you whenever needful on call. If it would be more satisfactory to Elliott & Co. I could meet you at Wilmington and we could execute the paper in their presence.

J. C. to B. D. H.

CINCINNATI, *May* 15, 1889.

I have yours of the 13th. I do not believe I can get away this week. When I wrote Sunday, I thought I could get the trust deed printed and ready to start for Philadelphia to-morrow night, but the paper has not been returned from E. J. & Co. yet.

I presume the attorney of the Trust Co. is munching over it. It would not help matters any to start Friday night.

If you had a commissioner of deeds for Kentucky in Brattleboro, I might send to you there for execution. Wire me on receipt of this if you have such a person there, and if not, if you can meet me in Philadelphia any time I telegraph for you.

96 J. C. to B. D. H.

CINCINNATI, *May* 16, 1889.

I have yours of the 14th. I enclose copy of letter from E. J. & Co. They also sent out all the papers, and I have been engaged all day with the printer and lithographer. The changes made were immaterial. I changed the date to June 1st.

I have sent you the new stock book by Am. Exp. Co. Please sign about one-half or 250 and bring book to Philadelphia with you. I shall arrive in Philadelphia Monday a. m. and hope you will be able to meet me there in the morning. As soon as the trust deed is executed, I'll take it to Baltimore that afternoon and then send it to Ashland.

I think now the bonds will be ready for us to sign on the 27th.

B. H. D. to J. C.

MAY 17, 1889.

Yours of the 15th with enclosure is just received and I have wired you "No commissioner papers legally executed here; can go to Philadelphia." Any document executed before a notary public with a seal accompanied by certificate of the clerk of the county court, also under seal, that said notary is of record and what he professes to be, is *good anywhere* in this country, as I understand it. Ask your lawyer. The above is the way I should execute the mortgage if sent to me here, but if it is better to go to Philadelphia or Wilmington and do the business there I will respond on call. If you send the mortgage to be executed by me here, hope that you will be able to meet me to sign bonds, etc., between 23rd and 29th inst., as I shall have to go to N. Y. about that time for my family.

B. H. D. to J. C.

BRATTLEBORO, *June* 3, 1889.

Yours from Wilmington received. I do not at all like the scheme for our company to take any responsibility to maintain prices

on the stock market and thus put ourselves in the position to buy back our own bonds and stock almost at once and quite likely at a much higher price than we sold for. I don't believe our company should go into buying and selling its own stock and bonds in a speculative way. I consented very reluctantly, as you know, to accept the offer of Elliott, Johnson & Co. to place our bonds, upon terms that I deemed almost ruinously liberal on our part, because I believed they could and would close out the whole issue of bonds and make an end of the matter almost at once, and that thus we should have a positive and definite result, having no risks or contingencies about it, upon which we could rely and make safe plans for the future. We give them a very big margin on our securities and of which they will make (and I find no fault with this) very unusually large profits.

97

It, therefore, seems to me that they, and not we, should take the responsibility and risk, if any there are, of listing them on the stock market. It was no part of our original plans with Elliott & Co. that we should engage in this business and did not enter at all into our arrangement with them. Our plan was to *sell* $300,000 bonds with a bonus of $150,000 stock outright and positively for the net sum of $255,000 and not buy at all. As I look upon it now, it would be both unwise and unsafe for us to adopt the plan proposed.

J. C. to B. D. H.

CINCINNATI, *June* 5, 1889.

Herewith please find checks on Am. Exp. Nat. Bank of N. Y. one for $15,393.50 to pay our note of $15,000 at the Keene Savings Inst. and $393.50 to pay the interest on same to June 7, 1889. Also one for $8,000 to pay my note discounted by Cheshire nat. bank and due on the 8th inst. Total dfts. for $23,393.50.

Just before leaving Wilmington Saturday I received Elliott, Johnson & Co.'s check for $21,250, being the proceeds of $25,000 bonds sold.

B. D. H. to J. C.

BRATTLEBORO, VT., *June* 7, 1889.

Yours of 5th with two drafts amounting to $23,393.50 to pay Co.'s note of $15,000 and int. ($393.50) at savings bank and your note for $8,000 at Cheshire Nat. Bank, Keene, N. H., is just received. I shall go to Keene to-morrow morning and take up the notes and bonds and will send notes to you as requested.

98

J. C. to B. D. H.

CINCINNATI, *June* 8, 1889.

Yesterday I received from E. J. & Co. $10,200 proceeds of 12 bonds delivered.

I send herewith draft on Third Nat. Bank N. Y. for $5,097.23 to

pay your note to Mrs. Phelps and interest on same from March 1st to June 10th inst.

B. D. H. to J. C.

BRATTLEBORO, *June* 10, 1889.

I have received yours of the 8th enclosing check for $5,097.23 to pay Mrs. Phelps' note and interest which I will at once apply to that end.

J. C. to B. D. H.

CINCINNATI, *June* 13, 1889.

I have yours of the 10th Elliott, Johnson & Co.; will take up Dr. Aitman's bond by giving him a new one and will send the old bond to you.

J. C. to B. D. H.

CINCINNATI, *June* 11, 1889.

I have received another remittance from E. J. & Co. of $4,250, the proceeds of $5,000 bonds sold.

I shall undoubtedly soon receive more remittances, as soon as they reach $21,000; I will send you so that you can cancel all the bonds.

J. C. to B. D. H.

CINCINNATI, *June* 15, 1889.

Enclosed please find draft on Am. Exg. Nat. Bk. N. Y. for $21,000 to pay for 21 bonds G. W. M. & M. Co.

This will redeem all bonds but the one held by Dr. Aitman, which bond will be taken up by E. J. & Co. and forwarded to you.

I received to-day $8,599 from E. J. & Co. for 10 bonds sold
99 the Hon. Jacob Tome, of Port Deposit, Md., who they think will take $20,000 more about July 12th.

They say all bonds are slow and will be until after July 1st. They have sold quite a number to be delivered between July 1st and 15th.

Mr. Goodman took five to be delivered next month, for which I accepted his order on me.

Total receipts to date from E. J. & Co., $49,300.

B. D. H. to J. C.

JUNE 17, 1889.

I have just received your letter of the 15th inclosing check for $21,000 as stated. I have written Elliott & Co. that I have now on hand ready for cancellation, 59 of the 60 old bonds and only await the receipt of the other bond from them to remove the old incumbrance on the Peach Orchard property. I hope they will send it to

me without delay. To whom shall I have Mr. Coe send the cancelled bonds, to you or to Richardson, with the released mortgage? Wouldn't it be better to send them all to you and then you forward mortgage to Richardson? It would cause little or no delay.

J. C. to B. D. H.

CINCINNATI, *June* 24, 1889.

Upon return from an inspection of the Cincinnati Southern Ry. I found letters from Elliott, Johnson & Co. enclosing drafts of $20,750 and $8,500. The first was the last payment from Du Pont on the 50 M. bonds he took less the commission of $500. on the 5 M. bonds, sold Goodman. The $8,500 was the proceeds of sales of 10 bonds to Geo. Eakins of Philadelphia.

I do not expect any more remittances until after July 1st.

J. C. to B. D. H.

CINCINNATI, *June* 27, 1889.

I have yours of the 24th enclosing letter from Elliott, Johnson & Co. which is herewith returned.

I have sent Mr. Coe the money for the July coupons, and also $250 for his compensation as trustee, which is the amount Holden agreed to give him when he accepted the trust.

100 B. D. H. to J. C.

JUNE 24, 1889.

I enclose a letter just received from Elliott & Co. in response to one I wrote them on the 20th urging them to send me the old bond. I wrote them that I had 59 instead of 49 already in hand and was waiting for the one bond to have the old lien entirely removed from the Peach Orchard property.

B. D. H. to J. C.

JULY 1, 1889.

That missing bond (No. 11) turned up this morning and I have cancelled the whole issue (60 bonds) and have sent them by express to Geo. S. Coe, trustee, with the request that he will execute a valid release of the mortgage and send it to you to be put on record. I also requested him to send you the cancelled bonds if that is the proper disposition to be made of them, so that the matter is ended, so far as my action is concerned.

I ruled out all the remaining coupons with red ink, and had printed on the back of each bond this: "Paid and cancelled July 1, 1889, B. D. Harris, pres't." in prominent type and in red ink. Weather hot and sultry.

J. C. to B. D. H.

CINCINNATI, *July* 1, 1889.

I enclose letter from E. J. & Co. received while away. $10,200 from them for 12 bonds sold.

J. C. to B. D. H.

CINCINNATI, *July* 8, 1889.

I have just returned from Ashland and find your several letters as well as some from Elliott, Johnson & Co., and one from Mr. Coe, also the 60 bonds cancelled. I have sent the certificate of Mr. Coe to Mr. Richardson to hand to the clerk of the court, but I fear he will not give his certificate until he gets the old deed properly cancelled.

I have not time to send you a full statement of E. J. & Co. letters. They have remitted since the 1st for 10 bonds sold $8,500; 7 bonds sold $5,985 and for 6 bonds sold $5,100, total $19,585.

101 B. D. H. to J. C.

JULY 3, 1889.

Yours of the 1st received and I herein return Elliott & Co.'s letter. They seem to be making good progress in placing the bonds and will probably sell all of them. I notice that they still seem to expect our company to protect the price of bonds and stock on the stock market when they are listed. As this is entirely out of the question, as I wrote some time ago, I think they ought to be so told. Such an undertaking on our part would swamp us beyond a doubt.

J. C. to B. D. H.

CINCINNATI, *July* 10, 1889.

I am in receipt of your favor of the 7th and also your telegram of this date.

My program now is to leave here next Sunday night, spend Tuesday in Wilmington with E. J. & Co. and meet you in N. Y. on Wednesday.

In my Monday letter, I said I had received one check of $5,985 from E. J. & Co. for 7 bonds sold. I should have said $5,950. Since then I have received from E. J. & Co. a draft for $850 for one bond sold.

J. C. to B. D. H.

CINCINNATI, *July* 24, 1889.

When I left Mr. Scott Saturday, he had a letter from Mr. Gazzam, of Philadelphia, agreeing to take $15,000 of bonds for a Mr. Reading. Of course, by this time I expected to have a check for the pro-

ceeds, but instead I received the enclosed telegram, and a letter to-day, simply says that Mr. Gazzam wrote cancelling the order. He hopes, however, to soon place the remainder of the bonds.

J. C. to B. D. H.

CINCINNATI, *Aug.* 15, 1889.

I send herewith copy of minutes of the several meetings as transcribed on the record book, relating to the matter of issuing bonds. Please write me to care of "Antlers," Colorado Springs, Col. I shall leave to-morrow night.

102 J. C. to B. D. H.

CINCINNATI, *Sept.* 10, 1889.

At last I have got back from a very hurried trip, which I am afraid has been of little benefit to me.

Was much disappointed to find only a small remittance of $3,400 from Elliott, Johnson & Co.

B. D. H. to J. C.

BRATTLEBORO, VT., *Sept.* 12, 1889.

I am glad to get another letter from you after a month's delay. Why don't pres't. of Lafayette bank pay for his bonds?

I would like a statement of all bonds sold, as I have mislaid the memoranda I had.

J. C. to B. D. H.

CINCINNATI, *Sept.* 14, 1889.

I am in receipt of your favor of the 12th. Mr. Hinsdale is away; on his return Monday I will have him make a statement of all bonds sold.

The reason Mr. Goodman has not paid for his bonds, is because I am to pay for them. In other words, I got him to take them on account of a debt I owed him, thinking it would help Elliott, Johnson & Co. in their sales, and I concluded that after all were sold I would apply the payment for those five bonds on the amount coming to me.

Elliott, Johnson & Co. write that they have given an option on the remainder of the bonds to a German banker.

The Augusta man who took $25,000 in July, payable 1st Sept. has begged off until Oct.

B. D. H. to J. C.

BRATTLEBORO, *Oct.* 19, 1889.

Yours from Wilmington came duly to hand, and I was glad to learn that Elliott, Johnson & Co. are determined to sell all our

bonds. It is time the matter was closed up in some way and I hope they will act promptly.

J. C. to B. D. H.

CINCINNATI, *Oct.* 22, 1889.

I am in receipt of your favor of the 19th. I arrived home
103 Sunday evening. Mr. Elliott told me he was coming to Cincinnati on other business with Col. Smith. He will let me know exactly when, so I can notify you.

J. C. to B. D. H.

CINCINNATI, *Oct.* 31, 1889.

Have just returned from Peach Orchard with Mr. Elliott and Mr. Stewart, who very kindly went with us, taking his car.

We first went to the Whitehouse cannel mine, with which Elliott was much pleased, then returned to our mines; we went all through them, and you ought to have seen how delighted Elliott was. He was enthusiastic, said he never saw such coal for quantity, thickness and quality.

He has written a report to his partner, very highly colored, speaking in the highest terms of praise about the coal, our method of handling it and everything connected with the property.

He says upon his return he will have no difficulty in placing remainder of bonds.

J. C. to B. D. H.

CINCINNATI, *Nov.* 6, 1889.

Your telegram came and was answered by Mr. Hinsdale. I am expecting daily a letter from E. J. & Co. Last week I received a check for $8,500 for ten bonds sold. They said it was out of the lot purchased by Jackson, of Augusta, Ga.

It was not right, as he agreed to pay interest from July 1st, making $170 interest due.

I called Mr. Elliott's attention to it, who said it should be corrected.

J. C. to B. D. H.

CINCINNATI, *Nov.* 9, 1889.

I have a letter from Mr. Elliott with the enclosures I have been expecting. All o. k.

He has also sold $2,000 bonds for 85 and accrued interest and sends $1,752.33 to pay for same.

You see, therefore, that the stand I took about the 10 bonds sold they acknowledged to be right. Hereafter all bonds sold will be counted for with interest accrued.

104 J. C. to B. D. H.

DEC. 7, 1889.

I arrived home yesterday. In my interview with Mr. Elliott and Mr. Scott, I stated to them that our bond matter must be closed up by January 1st. They both expressed themselves, that they were certain to dispose of the remainder this month, provided money eased up. At all events they knew that soon after the 1st January, when such large amounts were paid for dividends and interest there would be plenty of money to invest. I said all bonds sold this month would be flat, afterwards the price would be increased and with interest. They received from Mr. Graham $10,000 to pay on account of his purchase bonds, and that upon his return from Denver he would pay the balance. I authorized them to say to him, if the balance were paid before January 1st we would charge no interest from Dec. 1st.

Mr. Wellman reports coal business good, but prices low. The rains kept the river up so that lots of coal has been sent to market.

J. C. to B. D. H.

CINCINNATI, *Dec.* 21, 1889.

Herewith please find note from E. J. & Co. It is encouraging but as usual contains no money. I have written them to first send a copy of Mr. Cragin's written agreement to buy, although we would much prefer a note.

J. C. to B. D. H.

CINCINNATI, *Dec.* 30, 1889.

I have a letter from Mr. Elliott, who says Mr. Graham writes him that he was taken very ill on his return from Colorado, and compelled to stop over at Canton, Ohio; that as soon as he is able to travel he will go to Philadelphia and settle with him. From that I infer we will not get anything this week.

He also says it is impossible to get any one to take bonds until after the January dividends are paid.

J. C. to B. D. H.

CINCINNATI, *Jan.* 11, 1890.

105 Up to and including August 19, 1889, there had been sold by E. J. & Co. 171 bonds of which I think you have a list. Since then they have sold

Oct. 24,	to Hon. Jacob Tome,	10 bonds.....	$8,500
Nov. 7,	to est. Sam'l Morris,	2 bonds.....	1,700
Dec. 2,	to S. M. Curtis,	3 bonds.....	2,550
Dec. 9,	to D. B. Scott,	5 bonds.....	4,250

Making a total of 191 bonds sold and paid for.
Mr. Graham bot. 50 bonds and has paid $10,000.
Mr. Cragin bot. 20 bonds to be paid for June 1, 1890.
Mr. Goodman takes 5 bonds to be allowed on what I owe him.
Unsold 43.
300.

I have received cash for bonds sold		172,400
Paid for old stock and bonds	127,000	
Advanced company	15,000	
Advanced company in Dec	5,000	
Pd. expenses for bond matter	2,960.80	
		149,960.80
Balance for old debt		22,439.20

B. D. H. to J. C.

BRATTLEBORO, *Jan.* 31, 1890.

I wrote Elliott & Co. yesterday that in my opinion unless all the bonds were sold before March 1st, certainly April 1st, they should be withdrawn from the market.

B. D. H. to J. C.

BRATTLEBORO, VT., *Feb.* 12, 1890.

Yours of the 10th with letters from Scott & Johnson received and herewith return the letters.

I also send you a letter to me from Elliott & Co., in response to a letter from me (of which I have written you before, I think) saying, that in my opinion all our bonds not sold by March 1 (and certainly by April 1) should be withdrawn from the market and the bond deal closed up.

I hope and almost believe they will sell the balance before the dates named and so make a clean thing of it.

J. C. to B. D. H.

CINCINNATI, *Jan.* 28, 1890.

Upon my return I found a letter from Mr. Elliott which
106 I enclose. I also had another short note, enclosing a check for $5,000 from Mr. Graham, who seems to be very slow in settling in full for the $50,000 bonds.

J. C. to B. D. H.

CINCINNATI, *March* 4, 1890.

I have heard nothing from the East since my return. I am afraid E. J. & Co., are having a hard time selling the remaining bonds.

B. D. H. to J. C.

MARCH 7, 1890.

Yours of the 4th received. I hope you will at once notify Elliott & Co., that the bond deal will positively be closed April 1st, and that all bonds remaining unsold at that date must promptly be returned to you.

They certainly ought to dispose of the remaining $20,000 (I understand that is the amount unmarketed) before April 1st, but, if they don't, my brother and I will take one-fourth, you another and the working capital one-half at 85 and 50 per cent. stock and close the deal in this way. I am not willing that this shall hang along a single day beyond the time named. At our annual meeting, as I have before written, I want to see all old debt wiped off the books, as per agreement, and a new start made with a clean record. Please have all accounts, statements and books in readiness to show this and oblige.

J. C. to B. D. H.

CINCINNATI, *March* 12, 1890.

Elliott, J. & Co. have sold 8 more bonds to be paid for in 60 days; that leaves 12 unsold.

They wish us to list them as "per agreement."

B. D. H. to J. C.

MARCH 15, 1890.

Yours of the 12th (mailed 13th) is received. I herein send you a letter received from Elliott & Co. in response to one I wrote them telling them I had requested you *positively* to withdraw all bonds not absolutely sold on the first day of April, as we were determined to end the bond deal at that date. By all means we should
107 firmly *insist* on this and you can put as much of the responsibility on me as you please for it. In one sense it would be better that they should not sell all the bonds for this failure on their part would relieve you of any express or implied obligation about listing securities, by reason of any talk you may have had with them on that subject. In my opinion it would be absolute suicide for the company to enter into any such scheme involving obligations to buy back the securities we have had so much trouble and expense to sell. To sustain the market effectually would surely *bankrupt* the company. You say they (Elliott & Co.) "wish us to list the bonds as per agreement." What agreement? At the time they claim it was made by my brother and I, owning three-fifths of the stock, had no knowledge whatever of any such scheme, and of course never "agreed" to it, and have never since agreed to it. On the contrary, the only time it was ever mentioned to me in the presence of Elliott & Co. (Mr. Scott) I emphatically opposed it,

finally saying that if it was done at all, it should be by individuals and never by the company, and I did not agree to this ever, but said I should consider it when the time came; it would simply be throwing away whatever was put up without a penny's benefit to anybody, except the brokers. What do we care whether the bonds sell on the market or not? Our only concern should be to pay interest and dividends. Now if my wishes are to have any weight, I must insist that this bond deal shall be absolutely closed with Elliott & Co. on or before April 1st and that all bonds not *absolutely* sold at that date shall be returned to the company. This 60 day option on the last $12,000 by Elliott & Co. should be promptly disapproved, because it was made after they had positive notice from me that the deal must be finally closed not later than April 1st, which meant of course, full payment as well as sale. Let us get these $12,000 back into the treasury by all means and so relieve you of all embarrassment about listing. We, my brother and I, will take half of them, if you'll take the other half, and let that end it. If it will help to smooth the arrangement, you can say that the company can use the bonds as collateral East to raise money on, and so don't care to sell them. Manage this as best you can, but I shall oppose with all my might, and by all legal means unless I change my mind, which is not probable, any involvement of the
108 company in any scheme to buy back the securities as proposed; and I would not give five per cent. for all returns for money put up by individuals for this purpose.

J. C. to B. D. H.

CINCINNATI, *March* 18, 1890.

I am in receipt of yours of the 15th. You are mistaken if you think I, on my own responsibility, made an agreement with E. & J. Co. about listing and protecting our securities.

At the time I concluded arrangements with them to sell our bonds, I consented they should be listed on the Baltimore stock exchange, as they said it would be impossible to sell them unless they were to be listed, and I so notified you.

Afterwards Mr. Scott said it was useless to list them unless the company agreed to support the market. I did not agree to it and said I must consult you, and I at once wrote you about it. In reply you objected and used the same arguments as now, which I considered sound and convincing.

When we met Mr. Scott in Philadelphia, I think last May, he brought up the subject again, and my impression is, we agreed if E. J. & Co. put up $5,000, you and I would put up $5,000 in proportion to our holdings, for that purpose, as individuals, not as a company, Mr. Scott stating that $10,000 would be ample. I may be mistaken about your agreeing to it.

B. D. H. to J. C.

MARCH 20, 1890.

Yours of the 18th is received with copy of your notes to Elliott, Johnson & Co. I am very glad to learn that you did not, as I have always supposed, agree to sustain the market if the bonds were listed. When you first informed me about the listing project, you at the same time said, in substance, the market must be sustained by the company, as per Elliott & Co.'s claim, and I very naturally inferred that this was the arrangement between you. I think your letter, which I have, very plainly warrants that inference. But, according to your present explanation, the company is under no obligation, express or implied, to do this thing, by reason of any
109 agreement on your part. *All right so far.* Now to individual obligation. I certainly did not agree to it. After combatting with all my might the idea of involving the company in any such fatal scheme, I did say, that if done at all, it should be by individuals, but I did *not* agree to be one of the individuals. I simply said I would consider it when the time came. Having no faith in the practicability of the scheme and believing that every cent put up in this way would be sunk, and without benefit to anybody, I was certain about what I said, and I remember distinctly about it. Scott first said $10,000 would do, and afterwards thought $5,000 might, very likely. If you can get those bonds back (the $12,000) into the treasury, it will be the easiest solution of the whole matter, and I hope you will do it. I have expressly notified them twice, as you know, that the deal must be closed *absolutely not later than April 1*, and you have, more than once, done the same thing I suppose, as per my request, so they can find no fault. Now, as to the $12,000 bonds, we will take half of them as proposed, on condition that you take the other half, our object being to close up the bond deal absolutely.

J. C. to B. D. H.

CINCINNATI, *March* 22, 1890.

I have your favor of the 20th. I go to N. Y. to-morrow night to attend a R. R. meeting.

I enclose letter from E. J. & Co. in reply to my notice to them. Will you please write them?

I replied to it that I had peremptory orders from you to close up the bond deal by April 1st. I can see no objection to granting 30 days more.

B. D. H. to J. C.

BRATTLEBORO, *March* 24, 1890.

Yours received and I enclose letter which you can send to Elliott & Co. if you think proper.

I think we had much better take back $12,000 of the bonds if it will

let you out about sustaining the bonds on the market. If it will not help you in that respect, then you, of course, can give them 30 days' grace if you think best.

110 J. C. to B. D. H.

APRIL 7, 1890.

Yours of the 5th is just received. My two objects in insisting on closing bond sale April 1 were, 1st, that we might (as we must) at our annual meeting, have a full and complete and final settlement of our books, and in every other way, of all old matters covered by our agreement based on this bond sale; and that was why I suggested that I would not oppose the 30 days' extension of time asked for, *provided* you were so confident of their (Elliott & Co.) closing out all the bonds, as to be willing to anticipate their closing out by yourself accepting these now unsold bonds and their proceeds and make the settlement at the annual meeting *in full* as above. Under our agreement, these few bonds belong to you any way. My other object was by stopping the deal while a few bonds remained unsold, to absolve you from any obligations to Elliott & Co., by reason of any talk you may have had with them, to sink any money individually, or as a company in a vain attempt to sustain the price of the bonds on the market. Having stated my views and position I was, and am, willing that you should manage this thing in your own way to accomplish the desired result, as you understand Elliott & Co. much better than I do.

J. C. to B. D. H.

CINCINNATI, *April* 9, 1890.

I have yours of 7th. E. J. & Co. have not replied yet to my letter; as soon as I hear from them will let you know.

J. C. to B. D. H.

CINCINNATI, *May* 1, 1890.

I enclose letter from Elliott received on Monday, which I would have sent you that day but it was mislaid while moving, and I only found it to-day.

J. C. to B. D. H.

CINCINNATI, *May* 24, 1890.

Herewith please find application for listing bonds. I have filled in all the blanks and signed as sec'y and treasurer.

111 Please sign as pres't. Have it witnessed and acknowledged before a notary.

Please mail the application to Elliott, Johnson & Co.

J. C. to B. D. H.

CINCINNATI, *May* 28, 1890.

I have your two letters of the 24th and 26th. The last one I will send to E. J. & Co. and ask them to write to you.

I do not understand that that paper amounts to any more than to list the bonds. It does not require us to support the market, which the company as a company can not do. We only agree to furnish the information to list the bonds.

I leave to-night for Boston.

B. D. H. to J. C.

JUNE 2, 1890.

Herein find letter from Elliott, Johnson & Co. with copy of my reply. It is decidedly cheeky to say I offered to put up money to sustain bonds. I did nothing of the kind, being very careful while saying nothing to interfere with sale of bonds, to make no positive promises, *and I did not make any.* I knew what I was about, and unless they want to quarrel with me, Elliott & Co. had better not accuse me of saying one thing and doing another. That is not my style.

B. D. H. to J. C.

JUNE 4, 1890.

Yours received. In regard to sustaining the market for bonds, I certainly did not promise that my brother and I would stand in. Being opposed to the whole scheme, I was careful what I said and did not commit myself directly or by implication to it. The strongest language I used was that "I wouldn't say that I wouldn't;" "Would consult my brother and decide when the time came," etc. Scott and you talked further, but this is the substance of what I said, and *all* I said. And I have a very distinct remembrance of the whole conversation, for I did not *intend* to commit myself.

112 J. C. to B. D. H.

CINCINNATI, *June* 21, 1890.

I have heard nothing from E. J. & Co. since I saw them in Philadelphia.

The closing out of the remaining bonds is mighty slow as well as the settlement for those sold.

J. C. to B. D. H.

CINCINNATI, *Sept.* 29, 1890.

I have received no money from E. J. & Co. since last May, and I am afraid I shall have to carry those bonds myself.

EXHIBIT "99."

(Page 5 of Journal.)

			March.
Voucher.			
24	William Wood and others, labor at mines	$906.87	
31	Lane, powder	56.35	
32	A. H. Pugh, printing	21.50	
60	T., T. rails	141.00	
62	Collars for mules	4.15	
85	Norton iron works, nails	32.25	
91	Ashland foundry, turnouts	44.80	
			$1,206.92

(Page 6.)

			April.
22	William Wood and others	$795.27	
28	Globe File Company, letter file	9.80	
48	Lawrence iron works, spikes	37.50	
53	Lane, powder	126.75	
72	Norton iron works, nails	6.80	
			$2,183.04

(Page 9.)

	Hatton & Warren, for wagon	$75.00	

(Page 13.)

			May.
8	Engineers	19.39	
113			
22	Geo. Hall and others, labor	787.69	
38	Norton iron works, nails	10.00	
59	Penn Lumber Co.	33.00	
62	Lane, powder	61.05	
67	Northup, timber	67.62	
76	Ashland iron works, castings	3.28	

(Page 13.)

			May.
Voucher.			
81	Lawrence iron works, spikes	7.50	
	Sketch of tipple	2.00	

(Page 19.)

24	Geo. Hall *et al*	789.92	
50	Lane, powder	78.05	
63	Smith & Mitchell, lumber	38.50	
82	Norton iron works, nails	21.70	
			$4,177.74

(Page 24.)

			July.
25	Geo. Hall *et al*	$803.73	
46	Powell & House, bricks	7.00	
58	A. H. Pugh, printing	20.25	
76	Nelsonville machine w'ks, chain	100.50	
88	Lane, powder	66.55	
			$998.03

(Page 28.)

			August.
18	Geo. Hall *et al*	$760.87	
45	J. M. Lane, powder	112.50	
50	Northup, timber	7.50	
64	Meinhart, hardware	7.85	
	Oliphant, express to mines	16.00	
			$904.72

(Page 35.)

			September.
18	John Deering, tipple	$110.93	
19	John Deering *et al.*	740.57	
42	Barrett & Waters, oakum	27.25	
114			
54	Norton iron works, nails	3.25	
68	Lane, powder	79.06	
			$961.06

(Page 39.)

			October.
4	Jno. Dillon, supplies	$12.26	
7	Ford & Cecil, supplies	5.00	
8	C. B. E. T. Co., grate	5.21	
	Lane, powder	50.66	
14	Belting	12.65	
15	Powell & House, bricks	37.50	
17	A. C. & I. Ry. Co., spikes	15.00	
18	John Eppling *et al.*	835.75	
20	John Deering *et al.*	128.05	
			$1,102.08

(Page 47.)

			November.
4 & 5	Lawrence iron works	$104.00	
6	Lane, powder	54.77	
8	Mule	65.00	
12	Rope	287.60	
13	Lumber	41.44	
15, 16 & 17.	Hanun & Co.	13.65	
22	Jno. Epping, *et al.*	923.58	
24	John Deering, *et al.*	166.30	
			$1,656.34

(Page 51.)

			December.
5	Engineering	$37.50	
8	Lumber	2.40	
9	Stove pipe	6.05	
10	Lane, hardware	155.29	
11	Ashland iron works, wheels, etc	107.34	
12	Russell, leather	6.36	
13	Meinhart, hardware	4.06	
14	Connett, rails	22.50	
15	Stationery	32.85	
16	Oliver & P., spikes	65.57	
17	Lawrence iron works, spikes	16.00	
18	Lambert, pulleys	29.60	
115			
27	Tyler, legal services	50.00	
30	Jno. Epping *et al.*	1,003.18	
31	Jno. Dering	182.55	
			$1,724.25
			$11,524.26
			89.05

(Journal.)

Page.			
50	Barges	$475.00	
	Barges	1,115.90	
56	Barton, for rope	135.15	
			$1,726.05
			$13,339.96

(Ledger.)

67	Barges, 1884	6,382.73
		$19,722.69
		13,788.94
		$5,933.75

EXHIBIT "100."

"Construction account," page 2, Ledger "B," of the Great Western Mining and Manufacturing Co., is charged to June 30, 1889, for improvements and betterments	$146,846.06
To which should be added, in 1884, as per exhibit made by me at request of Mr. Cleveland, attorney for complainant, and charged to "barge acct.," page 12, Ledger "B," the transfer of which was omitted	5,933.75
	21,508.97
	$174,288.78
Total construction account	91,585.03
Deduct net debt, January 1, 1889	$82,703.75
Leaves a balance of	

which is amount of net earnings put into betterments, as follows:

116

Net earnings, according to books of the Gt. Western Mining and Manufacturing—

1884	$2,669.34
1884, additional as per testimony of Jno. Carlisle	5,933.75
1885	4,503.19
1886	6,021.81
1887	21,579.67
1888	30,610.95
1889, 1st 6 months	18,999.98
	$90,318.69
Less dividends paid	7,600.00
	$82,718.69

EXHIBIT "105."

Indebtedness July 1, 1889, *and How Paid.*

Page.			
18	Bills payable:		
	Cheshire Sav. bank	$15,000.00	
	O. C. Phelps	5,000.00	
			20,000.00
			7,000.00
	John Carlisle		36,771.96
	John Carlisle		12,720.00
	John Carlisle		2,742.60
	Whitcomb		1,925.55
	Ford, Eaton & Co		3,017.71
	Ford, Eaton & Co		128.40
20	H. H. Wellman		2,283.36
45	Accounts payable		17.60
46	Thos. Henderson & Son		1,714.74
8	Chattaroi Ry		74.03
56	Jno. W. Hutton		189.50
61	Sundry credits		118.95
73	Steamer Mink		

88	Steamer Sea Lion			7.00
103	J. G. Patton & Co.			134.69
104	G. S. Richardson			268.39
106	Steamer Lucy Cole			57.13
108	Snyder Bros.			19.75
117				
134	John Carlisle			3,502.34
272	Ashland foundry and machine shop			22.79
281	J. M. Huff			56.20
282	Cole & Collins, T. B. Co			40.00
381	V. J. Drayor			39.19
382	A. H. Pugh Printing Co			54.50
387	Patton Bros.			6.45
433	Norton iron w'ks			2.00
	Jan. 1, 1884, bonds sold	10	$10,000	
	April 2, bonds sold	1	1,000	
	July 9, bonds sold	1	1,000	
	Sept. 25, bonds sold	10	10,000	
	May 1, 1885, bonds sold	10	10,000	
				32,000
	1889, bonds unsold			8,000.00
				$132,914.83

From books of the Gt. Western M. — M. Co.:

Apr. 1, 1890. 1st mortgage bonds			$20,000.00
Oct. 13, 1890. Treasurer			7,000.00
June 3, 1889	$12,000.00	$12,000.00	
Oct. 31, 1890. Treas'r.	12,771.96	24,771.96	
			36,771.96
31			12,720.00
Apr. 30, 1890. Note taken up by Jno. Carlisle			2,742.60
Dec., 1887, and Jan., 1888. Note taken up by J. Carlisle			1,925.55
May 4, 1887. Note taken up by J. Carlisle			3,017.71
Paid in July and August, 1889			128.40
Paid in July and August, 1889			2,283.36
Paid in August			17.60
Paid in July			1,714.74
Paid in July			74.03
Paid in July			189.50
Paid in July			118.95
Paid in July			7.00
Paid in July			134.69
118			
Paid in July and August			268.39
Paid in July			57.13
Paid in December			19.75
Paid in July and August			3,502.34
Paid in July			22.79
Paid in July			56.20
Paid in August			40.00
Paid in August			39.19
Paid in July			54.50
Paid in July			6.45
Paid in July			2.00
Bonds redeemed, 1889			40,000.00
			$132,914.83

EXHIBIT "106."

Whereas, by an act of the General Assembly of the Commonwealth of Kentucky approved January 19, 1856, Wm. P. Mellen, Archibald Bordens, Saban P. Moore, William T. Nicholls, William M. Snow and Daniel A. Giddon, their associates, survivors, successors and assigns, were created and constituted a body corporate and politic by the name and style of the "Great Western Mining and Manufacturing Company" for certain purposes and with certain rights therein specified, with a capital of three millions of dollars divided into thirty thousand shares of one hundred dollars each, and whereas by the 9th section of the said act of incorporation the corporators therein named, or any three of them, were authorized at any time after the papers of the said act, to proceed to take subscriptions for the capital stock of said company in such manner and upon such terms as they might specify, and when one thousand shares thereof should be subscribed, then the said incorporators, or any of them, should by writing notify each and every said subscriber of the amount subscribed and that a meeting of the said subscribers for the election of directors would be held at such time and place as they might designate in said notice, at which meeting the said corporators or any three of them should preside and act as judges of such elections.

Now, this is to certify that we the undersigned, Daniel A. Giddon, William T. Nichols and William F. Mellen, together
119 with Saban T. Moore, four of the corporators named in the said act of incorporation, did on the 6th day of July, 1858, open a book for subscriptions for the said capital stock and proceed to take subscriptions therein pursuant to the provisions of said act, at the Farmers' Bank of Kentucky, in Covington, in said State, and one thousand shares of the said capital stock having been subscribed for by responsible parties to be paid for in cash as called for by the directors of the said company after their election. We the undersigned corporators, did by writing notify each and every of said subscribers for said capital stock, that one thousand shares thereof had been subscribed, and that there would be a meeting of such subscribers at the Farmers Bank of Kentucky in Covington at 11 o'clock on the 7th day of July, 1858, for the election of directors to serve for the ensuing year.

And we further certify that at the time and place above named we did attend and preside at said meeting; that a majority of the stock so subscribed was represented at the said meeting by the subscribers therefor; that we did thereupon at the time and place named in said written notice, proceed with the said — of seven directors and act as judges thereof pursuant to the said 9th section of the said act of incorporation.

And we further certify that upon receiving and counting the bal-

lots of the said stock subscribers for seven directors of the said company to serve for the ensuing year and until their successors are elected:

George Carlisle received six hundred and thirty votes.
Robert B. Bowler received six hundred and thirty votes.
George K. Shoenberger received six hundred and thirty votes.
Larz Anderson received six hundred and thirty votes.
William Shoenberger received six hundred and thirty votes.
John Carlisle received six hundred and thirty votes.

William P. Mellen received six hundred and thirty votes, and that this was the unanimous vote of all the said stock subscribers attending the said meeting, and was a majority of all the stock subscribed.

Whereupon we hereby further certify that the said George Carlisle, Robert B. Bowler, George K. Shoenberger, Larz Anderson, William Shoenberger, John Carlisle and William P. Mellen were duly
120 elected and declared directors of the said Great Western Mining and Manufacturing Company for the ensuing year and until their successors are elected and assume the performance of their duties.

In testimony whereof we have hereunto set our hands this 7th day of July, 1858, at Covington, Ky.

W. T. NICHOLLS.
D. A. GLIDDON.
WM. P. MELLEN.

A meeting of the directors was called and held at the office of the company in Cincinnati, January 8, 1859.

Present: George Carlisle, Robert B. Bowler, George K. Shoenberger and Wm. P. Mellen.

George Carlisle was made chairman of the meeting and Wm. P. Mellen was made secretary.

It was resolved that we go into an election of officers of the company to serve for the present year, viz: president and secretary and treasurer.

Upon balloting for president, R. P. Bowler received four votes and was declared unanimously elected president of the company for the present year and until his successor shall be elected and assume the performance of the duties of his office.

It was then resolved that we elect one of the directors to act as secretary and treasurer of the company and upon balloting therefor, George Carlisle received four votes and was declared unanimously elected secretary and treasurer of the company for the present year and until his successor shall be elected and assume the performance of the duties of his office.

On motion of R. B. Bowler, it was resolved that a committee of three be appointed to prepare and report by-laws for the government of the company under the charter and the president, R. B.

Bowler, in connection with George K. Shoenberger, Larz Anderson, constituted said committee.

On motion of R. B. Bowler it was resolved that George Carlisle and George K. Shoenberger act as executive committee.

On motion the meeting was adjourned to be held again at the office of the company without further notice on Monday the 10th instant at 3 o'clock p. m.

At a called meeting of the directors of the Gt. Western Mining — Manufacturing Company held February 10, 1859.

121 Present: R. B. Bowler, George Carlisle, George K. Shoenberger and Larz Anderson.

On motion of Larz Anderson it was resolved that the seal procured by Geo. Carlisle for the company be adopted as the seal of the company.

There having been subscribed one thousand shares to the capital stock of the company, to-wit: 300 shares by Geo. Carlisle, 30 shares by John Carlisle, 300 shares by R. B. Bowler, 140 shares by Geo. K. Shoenberger, 30 shares by Wm. Shoenberger, 170 shares by Larz Anderson and 30 shares by Wm. P. Mellen and the same having been fully paid for, it was on motion of Geo. Carlisle resolved that the secretary have certificates of stock prepared in the form of those of the Peach Orchard Coal Company and issue the same to the several parties aforesaid in the number of shares subscribed by them respectively, the same to be signed by the president and secretary and to have the seal of the company affixed thereto.

On motion of Geo. K. Shoenberger—adjourned.

R. B. BOWLER, *Pres.*

GEO. CARLISLE, *Sec'y*,
By J. C.

At a meeting of the Great Western Mining — Manufacturing Company held at the office Jan. 1st, 1861.

Present: Geo. Carlisle, Geo. K. Shoenberger, R. B. Bowler and John Carlisle.

On motion of Geo. K. Shoenberger it was resolved that in order that a full and final balance of the books both at the mines and the office in Cincinnati can be made, it becomes necessary to order that the books at the mines be brought down, that W. P. Mellen is requested to write to Henry Danby by the Boston which leaves today, to come down immediately with the books and also that he take an accurate account of all the due bills on hand and outstanding, that we may be enabled to balance the accounts.

On motion adjourned.

R. B. BOWLER, *Pres.*

GEO. CARLISLE, *Sec'y*,
By J. C.

At a meeting of the Great Western Mining — Manufacturing Company held at their office April 3, 1861.

Present: Larz Anderson, Geo. K. Shoenberger and R. B. Bowler.

122 On motion of Larz Anderson it was resolved that Edward A. Foote be put in charge of the whole property at Peach Orchard at a salary of fifteen hundred dollars a year, to manage the business according to his best judgment, making regular reports to the company here subject to their control. Pay to commence April 1st, 1861.

On motion adjourned.

R. B. BOWLER, *Pres.*

GEO. CARLISLE, *Sec'y*,
By J. C.

At a meeting of the Great Western Mining — Manufacturing Company held at the office of the company July 2, 1861.

Edward Foote, the manager of the company, being present, made a full report of the condition of the company, which was resolved satisfactory, and he was authorized to go on with the management, using his good judgment and to make all the reductions in expenses and wages that he can possibly do without sacrificing the interest of the company.

On motion adjourned.

R. B. BOWLER, *Pres.*

GEO. CARLISLE, *Sec'y*,
By J. C.

At a called meeting of the board of directors of the Great Western Mining & Manufacturing Company held this day at their office, No. 92 Broadway, August 23, 1861, Cincinnati, O.

Present: Geo. Carlisle, Geo. K. Shoenberger, Larz Anderson and R. B. Bowler.

On motion of Larz Anderson

Resolved, That the president be authorized to convey all the property of the company, real estate and personal, on the terms of an agreement entered into between the president and Rebecca C. Jones on the 21st inst., which is filed in the office and to make and execute the proper deeds and papers and each of the stockholders assent that their stock shall be transferred to the said Rebecca C. Jones, and all of the franchise of the company may be assigned to her so far as they are assignable in law.

On motion adjourned.

R. B. BOWLER, *Pres.*

123 Office of the Gt. Western M. & M. Co.

CINCINNATI, *Oct.* 8, 1863.

A meeting of the stockholders of the Great Western Mining & Manufacturing Company, being called for by R. B. Bowler and John Carlisle on Oct. 8, 1863, at 10 o'clock a. m.

The meeting being called to order by Mr. Bowler, Mr. Larz Anderson was appointed chairman and John Carlisle, secretary.

Present: R. B. Bowler, Larz Anderson, Geo. K. Shoenberger and John Carlisle, representing all the stock.

It was resolved on motion of John Carlisle that a committee of three be appointed by the chair to advertise and make all necessary arrangements for the sale at auction of the Great Western Mining & Manufacturing Company property on Nov. 30, 1863. The committee is R. B. Bowler, Larz Anderson and John Carlisle.

On motion of Mr. Bowler, the meeting adjourned until called by the committee.

LARZ ANDERSON, *Ch.*

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

OCT. 10, 1863.

A meeting of the stockholders was held this day at the office of R. B. Bowler at 3 p. m.

Present: Larz Anderson, R. B. Bowler, W. Shoenberger and John Carlisle.

Larz Anderson in the chair, John Carlisle, secretary p. t. John Carlisle was elected permanent secretary of the board, owing to the death of the former secretary, Mr. George Carlisle.

In consequence of the seal being misplaced the secretary was authorized to procure another seal. Whereas on Feb. 10, 1859, an order was made to issue stock to the subscribers of this company and through inadvertence such stock not having been issued, it was resolved that president and secretary forthwith proceed to issue such certificates in accordance with said order. Whereas, the stockholders, R. B. B., L. A., G. K. S. and G. C. have furnished the company for their experience $75,000 in addition to their former subscription of stock, it was resolved that the president and secretary be
124 authorized to issue additional stock to those parties for that amount in the following proportion in satisfaction thereof, viz:

250 shares to Geo. Carlisle's estate.
250 " " R. B. Bowler.
125 " " G. K. Shoenberger.
125 " " Larz Anderson.

On motion Mr. Shoenberger, meeting adjourned.

LARZ ANDERSON, *Ch.*

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

CINCINNATI, *Nov.* 2, 1863.

A meeting of the directors of this company was held this day at 3 p. m. at the office of R. B. Bowler, Esq., No. 90 Broadway.

Present: R. B. Bowler, Larz Anderson, Geo. K. Shoenberger and John Carlisle.

Several bills were allowed and paid. It was resolved that the sale to take place to-morrow of the stock shall be for cash, but if the purchaser desires time and can furnish security either personal or real that shall be satisfactory to the sellers, that he is to pay one-third cash and the balance, six, twelve, eighteen and twenty-four months, with two per cent. interest and a decision of a majority of the stock as to what is satisfactory security shall be binding upon all.

It was resolved that the books and stock be turned over to the attorneys, Lincoln, Smith & Warnock, to be surrendered to the purchaser when the terms of sale are complied with.

It was resolved that two shares stock more be issued, one each to R. B. Bowler and John Carlisle, executor.

Motion to adjourn to Tuesday, Nov. 3rd at 3 p. m.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

CINCINNATI, *Nov.* 3, 1863.

Meeting organized at 2 p. m.

Present: R. B. Bowler, Larz Anderson, Geo. K. Shoenberger and John Carlisle.

The object of the meeting is to determine what security shall be taken from the purchaser of the Gt. Western M. & M. Company. On motion of Mr. Bowler, it was

Resolved, That notwithstanding the resolution of the 2nd inst., is that a majority of the stock shall determine the security
125 offered by the buyer; that in the settlement with the buyer each individual stockholder shall use his own pleasure and judgment and that the settlement with the buyer shall be with the owners of the stock respectively, and the stockholders in the aggregate shall not be governed by the individual action of each stockholder.

On motion adjourned.

JOHN CARLISLE, *Sec'y.*

Office Gt. W. M. & M. Co.

CINCINNATI, *March* 27, 1868.

Meeting organized at 10:30 a. m.

Present: Messrs. Shoenberger, Anderson, W. H. Shoenberger and John Carlisle.

Owing to the death of Mr. Bowler, the president, Mr. Larz

Anderson, was unanimously chosen president of the board. On motion of Mr. G. K. Shoenberger it was resolved that Mr. W. P. Mellen having ceased to have interest in the stock of the Co., his position of director be declared vacant. On motion of Mr. W. K. Shoenberger Messrs. W. P. Anderson, L. Hinsdale and G. W. Carlisle were unanimously elected directors to fill the vacancies caused by the death of Messrs. R. B. Bowler and Geo. Carlisle and the retirement of W. P. Mellen.

On motion adjourned.

LARZ ANDERSON, *Pres.*

JOHN CARLISLE, *Sec'y.*

Directors:

LARZ ANDERSON, *Pres.*
JOHN CARLISLE, *Sec'y.*
G. K. SHOENBERGER.
W. H. SHOENBERGER.
W. P. ANDERSON.
L. HINSDALE.
G. W. CARLISLE.

Office of Gt. Western Mining & Mfg. Co.

CINCINNATI, *June* 8, 1869.

At a called meeting called this day, present, Messrs. G. K. Shoenberger, Larz Anderson, L. Hinsdale and John Carlisle, Mr. Larz Anderson, the president, stated the object of the meeting to consider the bill of T. D. Lincoln for legal services; amount of the bill five hundred and thirteen 80-100 dollars. On motion of Mr. Shoenberger the bill was ordered to be paid out of the funds in the hands of Mr. Anderson and Mr. Carlisle. There being no other business the meeting adjourned.

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LARZ ANDERSON, *Pres.*

JOHN CARLISLE, *Sec'y.*

Office Gt. West. M. & M. Co.

CINCINNATI, *Oct.* 7, 1871.

Pursuant to a call for a special meeting of the directors of the Great Western Mining and Manufacturing Company of Kentucky, Messrs. L. Anderson, G. W. Carlisle, L. Hinsdale and John Carlisle, which number being a quorum, the meeting was called to order by the president.

Mr. J. Carlisle stated that the meeting had been called to take into consideration the building of a railway from the mouth of the Big Sandy river to the lands of the Gt. W. M. & M. Co.

He stated a company was now formed to construct said railway and desired to work under the charter of said Gt. W. M. & M. Co.

On motion the following was passed unanimously:

Whereas, the directors of the Great Western Mining and Manufacturing Company are disirous of having railway communication from the lands of the company to the Ohio river;

Resolved, That they hereby agree to set apart and appropriate a portion of their capital stock for that purpose under the rights and privileges of their charter.

The following resolution was also passed unanimously:

Whereas, Edwin L. Buttrick and Benjamin F. Babcock, of Chicago, Illinois, have at divers and sundry times since the 1st of May, 1871, obtained contracts, options a nd privileges of mineral lands and the rights to the mineral upon lands in the valley of the Big Sandy river in the State of Kentucky, in the name of the Great Western Mining and Manufacturing Company, such options, contracts and rights being given by the holders and owners of lands upon the express condition and stipulation that they, the said Buttrick and Babcock would build or cause to be built under and by virtue of the charter of said company a railroad from Cassville, Virginia, or Louisa, Kentucky, to Peach Orchard, Kentucky, within three years, be it

127 *Resolved*, That the aforesaid contracts, options or rights be, and the same are hereby assigned to the said Edwin L. Buttrick and Benjamin F. Babcock, for the purpose of such railway construction and the secretary is hereby authorized to assign each and singular all the options, contracts or rights so taken. On motion adjourned to meet at the call of the president.

LARZ ANDERSON, *Pres.*

JOHN CARLISLE, *Sec'y.*

Office Gt. W. M. & M. Co.

CINCINNATI, *Oct.* 6, 1871.

Present: Messrs. Larz Anderson, G. K. Shoenberger, John Carlisle, G. W. Carlisle and L. Hinsdale. The minutes of the last meeting were read and approved.

The secretary reported he had assigned the options, etc., to Babcock and Buttrick as ordered by the last meeting.

The following preamble and resolutions were, upon motion of G. W. Carlisle, unanimously passed:

Preamble and Resolutions.

Whereas, the 4th and 5th sections of the act of incorporation of this company authorizes and empowers the president and directors to set aside a portion of the authorized capital stock of the company for the purpose of constructing a railroad or railroads from their lands to any point or points on the Big Sandy or Ohio rivers; *be it*

Resolved, That subscriptions be at once opened for the sale of one million dollars of the capital stock of this company, which sum is hereby set apart and appropriated for the purpose of building a railroad to be known as "The Ohio River and Big Sandy railway," in accordance with the power and privileges conferred upon it by its act of incorporation; and the said capital stock so set apart is hereby declared to be for the exclusive use and benefit of the parties subscribed thereto, for the purpose of said railway construction, and the president and directors hereby notify and confirm to the subscribers of the capital stock hereby set apart, all the rights, privileges and powers they possess under their charter and the laws of the State of Kentucky for the purpose of railway construction aforesaid. Provided that such railway company shall in *one* and legal form agree and obligate themselves to give all needed facili-
128 ties for transportation to the Great Western Mining and Manufacturing Company or their assigns and shall not discriminate against said company in rates of freight or facilities forever, but shall guarantee to said company every facility or rates of freight given to the most favored.

Provided also that the said road shall be completed within two years from date.

LARZ ANDERSON, *Pres't.*

JOHN CARLISLE, *Sec'y.*

Office Gt. W. M. & M. Co.

DEC. 11, 1872.

Pursuant to a call of the president the following directors were present at a special meeting. Messrs. Anderson, Shoenberger, G. W. Carlisle, Hinsdale and John Carlisle. Mr. G. P. Bowler, a stockholder was also present.

The minutes of the last meeting were read and approved. On motion of Mr. John Carlisle, the following preamble and resolution were unanimously passed:

Whereas, at a meeting of the board held Oct. 16, 1871, the following preamble and resolutions were adopted, to-wit:

Whereas, the 4th and 5th section of the act of incorporation of this company authorizes and empowers the president and directors to set aside a portion of the authorized capital stock of the company for the purpose of constructing a railroad or railroads from their lands to any point or points on the Big Sandy or Ohio rivers; *be it Resolved*, That subscriptions be at once opened for the sale of one million dollars of the capital stock of this company, which sum is hereby set apart and appropriated for the purpose of building a railroad to be known as "The Ohio River and Big Sandy railway" in accordance with the powers and privileges conferred upon it by its act of incorporation; and the said capital stock so set apart is declared to be for the exclusive use and benefit of the parties sub-

scribed thereto, for the purpose of said railway construction, and the president and directors hereby notify and confirm to the subscribers of the capital stock hereby set apart all rights, powers and privileges they possess under their charter and the laws of the State of Kentucky for the purpose of railway construction aforesaid;

"*Provided*, That such railway company shall in *one* and
129 legal form agree and obligate themselves to give all needed facilities for transportation to the Great Western Mining and Manufacturing Company or their assigns as shall not discriminate against the said company in rates of freight or facilities forever, but shall guarantee to said company every facility or rates of freight to the most favored. *Provided, also*, That the said road shall be completed within two years from date."

And whereas, no action has been taken under the same by the subscription of any of the said capital stock, set apart thereby for the use of the Ohio River and Big Sandy railway and the construction of the same or otherwise.

Therefore, Be it and it is hereby resolved that said hereinbefore recited preamble and resolutions be and are hereby rescinded and set aside.

The following bills were approved and ordered to be paid by the secretary, viz.:

R. Clarke & Co., printing reports, etc	$51.75
Eleigott & Kriebs, lithographing map, etc	75.00
	126.75

Mr. W. P. Anderson tendered his resignation as a director, also Mr. W. H. Shoenberger, owing to his removal from the city, resigned his position as director, whereupon the board unanimously elected Mr. G. P. Bowler and Peter Shoenberger to fill the vacancies.

LARZ ANDERSON, *Pres't.*

JOHN CARLISLE, *Sec'y.*

Office Gt. W. M. & M. Co.

CINCINNATI, *April* 28, 1873.

At a meeting of the stockholders held this day there were present Messrs. Larz Anderson, G. K. Shoenberger, John Carlisle and G. W. Carlisle.

The subject of transferring the stock of the Gt. W. M. & M. Co. to the Chattaroi Railway Co. was favorably discussed.

On motion of Mr. Carlisle the following resolution was passed:

Resolved, That in consideration of these having been paid out by the stockholders forty-eight hundred dollars ($4,800) for sur-
130 veys, rights-of-way, mineral options, charter, etc., that there be issued forty-eight (48) shares of stock to be divided *pro rata* among the stockholders, viz.:

To est. of R. B. Bowler, deceased	16	shares
" Larz Anderson	8	"
" John Carlisle	9	"
" Geo. K. Shoenberger	8	"
" G. W. Carlisle	8	"

Adjourned.

LARZ ANDERSON, *Pres't.*

JOHN CARLISLE, *Sec'y.*

Office K. C. R. R. Co.

COVINGTON, KY., *July* 1, 1873.

Pursuant to a call of the president, the board of directors of the Great Western Mining and Manufacturing Company met at eleven o'clock a. m. at the office of the Kentucky Central R. R. Company in Covington, Ky.

Present: Messrs. L. Anderson, Shoenberger, G. K., G. P. Bowler, G. W. Carlisle and John Carlisle.

Minutes of the previous meetings read and approved.

The resolution passed at a meeting of the stockholders held April 28, 1873, authorizing the issuing of forty-eight shares of stock was ratified and the president and secretary were directed to issue the same, viz.: sixteen shares to the administrators of R. B. Bowler, dec'd, eight shares to Larz Anderson, eight shares to Geo. K. Shoenberger, eight shares to G. W. Carlisle and eight shares to John Carlisle.

Mr. Hinsdale sent in his resignation as a director, his stock having been transferred to D. McLaren. On motion Mr. D. McLaren was unanimously chosen a director in place of Mr. Hinsdale, resigned. There being no treasurer, Mr. John Carlisle was elected treasurer of the company. Mr. Carlisle called attention to the fact that Mr. G. S. Richardson for the past seven years had acted as superintendent of this company, living at the mines, faithfully watching and protecting our interests, without receiving or asking any compensation therefor. It was therefore,

Resolved, That in consideration of his past services, the president and secretary are hereby directed to issue to Geo. S. Richardson, a certificate for fifty shares of stock.

131 Mr. Larz Anderson stated that he expected to be absent most of the summer. On motion the secretary was authorized, during the absence of the president, to call meetings of this board when necessary.

The following resolution was passed unanimously:

Resolved, That this company hereby sells to Daniel McLaren and Stanley Matthews, each, three hundred shares of its capital stock, amounting at par to thirty thousand dollars, for the sum of ten thousand dollars, payable in installments, as may be called by the

board of directors, and evidenced by the promissory notes of the said McLaren and Matthews, respectively for $10,000 each and the president and secretary are hereby directed to issue to each of them certificates for said three hundred shares of stock on the execution and delivery of said notes, the said certificates being assigned to the company as collateral security for the payment thereof.

On motion adjourned.

LARZ ANDERSON, *Pres't.*

JOHN CARLISLE, *Sec'y.*

LARZ ANDERSON	Died Feb. 1878.
JOHN CARLISLE, *Sec. and Treas.*	
G. K. SHOENBERGER	Directors.
G. P. BOWLER	Died M'ch 24, 1878.
G. W. CARLISLE	
D. McLAREN	Died.

Room 16, Carlisle building.

CINCINNATI, *Feb.* 28, 1874.

Meeting of the stockholders of the Gt. Western Mining and Manufacturing Company of Ky., having been called at the office of John Carlisle for this day at 11 a. m., there *was* present Messrs. L. Anderson, G. K. Shoenberger, Geo. P. Bowler, Stanley Matthews, G. W. Carlisle, Jno. Carlisle, Peter Shoenberger and Messrs. Elliott and Geo. H. Pendleton, administrators of R. B. Bowler's estate. Larz Anderson in the chair and Jno. Carlisle, sec'y.

The object of the meeting was to discuss the advisability of buying more coal lands adjoining the property of the company. Mr. Carlisle stated that Mr. A. H. Pugh, a civil engineer from Colorado, had lately visited the mines with him to examine whether the route was favorable from the Ohio river to the mines, for a cañon
132 gorge railway. He was so well impressed with the scheme and the value of the coal field, that he immediately entered into negotiation with Judge Borden for the purchase of 300 acres of land adjoining the property of this company; and that he now proposes to purchase said 3,000 acres, and will transfer the same to this company for its actual cost, the capital stock of the company at the rate of 33⅓ cents on the dollar (that is to say, if the land cost ten dollars per acre, or $3,000, we are to pay for the same $9,000 in stock), and in addition thereto he will subscribe $20,000 toward building the railway; provided, our company subscribes the same proportion, or $80,000, toward the railway. After considerable discussion, the following resolution was unanimously passed:

"Whereas, the stockholders of the Gt. W. M. & M. Co. deem it advisable to increase the territory belonging to them; therefore be it

"*Resolved*, That a committee of three, consisting of Messrs. Anderson, Matthews and Carlisle be appointed and authorized to pur-

chase such lands as in their judgment are desirable and to the advantage of this Co. to own, paying therefor not to exceed thirty dollars in stock per acre, and for that purpose we the stockholders, representing $210,000 of the total amount of $245,000 of stock issued by this company, set apart one hundred and fifty thousand dollars of the capital stock."

Mr. Carlisle read a report in favor of building the railway this year, upon the basis of a *bona fide* subscription of $200,000 in money, and an issuance of $600,000 of bonds, and suggested that this company subscribe $40,000 in money for that purpose, and endorse the bonds, mortgaging the property of the company to secure the endorsement. The suggestion was referred to the above committee with the addition of Geo. K. Shoenberger. Adjourned.

LARZ ANDERSON, *Pres.*

JOHN CARLISLE, *Sec'y.*

Room 16, Carlisle building.

CIN'TI, *April 1st*, 1874.

Special meeting of the stockholders of the Gt. W. M. & M. Co., called by the president at the request of Messrs. McLaren and Matthews, this day at 11 a. m.

Present: Messrs. Anderson, Shoenberger, Bowler, G. H. Pendleton, G. W. Carlisle and John Carlisle. Minutes read and approved.

133 The object of the meeting, as stated by the president, was to take into consideration the following communication from Messrs. McLaren and Matthews, viz.:

"To the stockholders of the Gt. W. M. & M. Co.

"GENTLEMEN: It becomes proper for us, in our judgment, for fear of future misconstructions to say, that when the arrangement was made with us by which we became the purchasers of three hundred shares each of the capital stock of your company, for which it holds our respective notes for $10,000 each, it was our understanding that we undertook the performance of no obligation in respect to the joint interest, other than to pay our notes as called upon, and to co-operate in whatever should be further agreed upon as we might be able. If there is a different impression or expectation on your part or the part of any of your number, we respectfully ask to be relieved from the embarrassment of being placed in a false position, by having the arrangement cancelled.

"Respectfully,

"STANLEY MATTHEWS.
"D. McLAREN."

In reply thereto the following resolution was adopted unanimously:

Resolved, That the sec'y of this company be instructed to notify Messrs. McLaren and Matthews that the stockholders are perfectly satisfied with the transfer of the six hundred shares of stock to them for the consideration stated in the agreement of June 25, 1873, and desire no further consideration other than that given by all the stockholders to promote the interests of this company, but nevertheless if Messrs. McLaren and Matthews are dissatisfied and desire the cancelling of the agreement, then in that case, the president and secretary are authorized to return them their notes and cancel the stock.

Some informal talk occurred upon various plans of building the railway. Mr. J. Carlisle proposed to organize a company to construct the railway, provided the individual stockholders of the company loaned $50,000 without interest or security for a term of years. The proposition was favorably received, but no action taken.

On motion adjourned.

LARZ ANDERSON, *Pres.*

JOHN CARLISLE, *Sec'y.*

134 Kentucky Central R. R. Office.

COVINGTON, KY., *June* 20, 1874.

A special meeting of the stockholders of the Gt. W. M. *M.* & M. Co. was called for this day at 11 a. m. at the above place, by the president. There was present represented over three-fifths of the stock. The minutes of the last meeting were read and approved. On motion adjourned to meet at the call of the president.

JOHN CARLISLE, *Pres't.*

Kentucky Central R. R. Office.

COVINGTON, KY., *June* 20, 1874.

Called meeting of the board of directors of the Gt. W. M. & M. Co.

Present: Messrs. L. Anderson, G. P. Bowler, G. W. Carlisle and John Carlisle.

The secretary stated the object of the meeting to be to decide upon a plan for the development of the property by constructing a railway to the Ohio river.

Upon motion of Geo. P. Bowler, the following preamble and resolutions were unanimously adopted:

Whereas, the paid up capital stock of the Great Western Mining and Manufacturing Company now amounts to the sum of $185,000, and it is desirable to reduce the same to the sum of $61,666.66, in

order that future subscribers to the capital stock of said company may be placed upon an equal footing with the present stockholders. Now, therefore, be it

Resolved, That the said capital stock shall, and the same is hereby reduced to the sum of $61,666.66, and the owners and holders of the certificates of stock heretofore issued shall within ninety days from this date surrender the same to the secretary of the company for cancellation, and shall receive in lieu thereof new certificates for one-third the amount of such old ones, and in case any stockholder shall fail or refuse to make such surrender and accept a new certificate as herein specified, it is understood and is hereby ordered that the legal and equitable rights of such stockholders as may make such surrender, shall not be in any manner prejudiced or diminished as against the stockholders so failing or refusing, but the old stock not surrendered, shall continue to represent only its proper proportion of the actual value of the property, and assets now
135 owned by said company, as if this reduction in the amount of the stock had not been made.

Resolved further, That the books be opened for the reception of additional subscriptions to the capital stock of this company to an amount sufficient to increase the same to the sum of $800,000, such additional subscriptions to be payable in such manner and at such times as may be agreed upon by the subscribers.

Resolved, That the president and secretary be and they are hereby appointed a committee on behalf of this company to enter into a contract with the Chattaroi Railway Company for the construction of forty miles of the said Chattaroi railway, beginning at the Ohio river and running southwardly, securing in such contract the privilege upon the part of this company to construct the remainder of said railway upon the same terms and conditions as may be agreed upon in regard to the said forty miles.

Resolved, That when subscriptions to the capital stock to the amount of four hundred thousand dollars shall have been made that a meeting of the original stockholders shall be called, to whom shall be substituted the foregoing resolutions for satisfaction.

Bill of Gov. Carlisle for legal services, amounting to one hundred dollars, was approved, and the treasurer ordered to pay it.

On motion of G. W. Carlisle, it was

Resolved, That the president and secretary be authorized to purchase such additional lands adjoining as may be for the interest of this company to own at a price not exceeding $10 per acre, so as to enable this company to control about 20,000 acres. On motion adjourned.

JOHN CARLISLE, *Sec'y.*

Office of the Great Western M. & M. Co., room 16, Carlisle building.

CINCINNATI, *Dec.* 31, 1875.

Meeting called by order of the president for this day at 11 a. m. Stockholders' meeting.

Present: Messrs. L. Anderson, G. K. Shoenberger, Peter Shoenberger and Jno. Carlisle.

Minutes of last meeting read and approved.

The committee on contract with Chattaroi Railway Company reported the matter in abeyance, owing to the continued disturbance of the money market.

136 The committee on purchase of land reported that negotiations had been commenced to buy about 8,000 acres of land at $10 per acre in the stock of this company at par.

Suggestions being made as to the feasibility of making a display at the Philadelphia Centennial Exposition of our coals, iron ore and woods, the secretary was directed to ascertain the cost of doing so, and obtain the written consent of the stockholders thereto. Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *March* 7, 1877.

Stockholders' meeting of the Gt. W. M. & M. Co.

Present: Messrs. Anderson, G. K. Shoenberger, P. Shoenberger, G. S. Richardson, G. W. Carlisle and John Carlisle. Peter Shoenberger called to chair.

The secretary stated the object of the meeting was to take into consideration the best means of encouraging the building of a narrow gauge railway from some point on the Ohio river to or near the mines and property of this company.

Mr. S. M. Barrett, on behalf of himself and associates, stated that if donations well secured amounting to $200,000 were raised that they would construct said railway as speedily as possible. The mater was favorably discussed, but owing to the absence of Mr. G. P. Bowler, no action was taken.

On motion adjourned to Saturday, March 10th, at 11 a. m.

JOHN CARLISLE, *Sec'y.*

Office Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *March* 10, 1877.

Adjourned meeting of the stockholders held this day at 11 a. m.

Present: Messrs. Anderson, G. K. Shoenberger, Peter Shoenberger, G. W. Carlisle, G. P. Bowler, G. S. Richardson and John Carlisle.

The president stated the object of the meeting was to take action

on the matter of extending aid to the construction of a narrow gauge railway up the valley of the Big Sandy.

Minutes of previous meetings were read and approved.

The following preamble and resolution was then offered:

137 Whereas, it is proposed to construct a narrow, or three-feet gauge railway from the Ohio river up the valley of the Big Sandy river in eastern Kentucky, or western Virginia, and being desirous that said railway shall be built, and being interested in its completion, and wishing to aid and encourage the enterprise; therefore, be it

Resolved, That the stockholders of the Gt. W. M. & M. Co. recommend to the board of directors to enter into an agreement with the proper parties, who shall cause said railway to be constructed, to donate the sum of $20,000, payable as follows: One-half, or $10,000 when the track of said road shall be laid to or near the junction of the Levissee and Tug River branches of the Big Sandy river, and trains running to that place, and balance, or $10,000, when the track shall be laid about forty miles from the Ohio river and trains running to that place.

After some informal discussion, the foregoing preamble and resolution was unanimously adopted by the following vote:

Larz Anderson, yea.
G. K. Shoenberger, yea.
P. Shoenberger, yea.
G. W. Carlisle, yea.
John Carlisle, yea.
G. S. Richardson, yea.
Geo. P. Bowler, yea.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *March* 10, 1877.

Meeting of the board of directors of the Gt. W. M. & M. Co., held this day at 12 m.

Present: Messrs. L. Anderson, G. K. Shoenberger, P. Shoenberger, G. P. Bowler, G. W. Carlisle and John Carlisle.

The minutes of previous meeting were read and approved.

The president stated that the object of the meeting was to take into consideration the recommendation of the stockholders to extend aid by a donation of $20,000 to the construction of a railway in the Big Sandy valley; and he presented the following preamble and resolution adopted at the stockholders' meeting held this day:

138 *Be it resolved*, That the stockholders of the Gt. W. M. & M. Co. recommend to the board of directors to enter into an agreement with the proper parties who shall cause said railway to be constructed, to donate the sum of $20,000, payable as follows: One-half, or

$10,000, when the track of said road shall be laid to or near the junction of the Levissee and Tug rivers, branches of the Big Sandy river, and trains running to that place, and balance, or $10,000, when the track shall be laid about forty miles from the Ohio river and trains running to that place."

After some discussion it was unanimously

Resolved, That the president and secretary, in accordance with foregoing resolution, be and are hereby authorized and directed to enter into a contract to pay to M. J. Ferguson, of Louisa, Ky., and John Carlisle, of Cincinnati, Ohio, trustees, or their successors, for the use and benefit of a narrow gauge railroad in the Big Sandy valley of Kentucky, the sum of twenty thousand dollars ($20,000), payable as follows: One-half, or $10,000, when the track of said railroad shall be laid from the Ohio river to or near the junction of the Levissee and Tug rivers, branches of the Big Sandy river, and trains running thereon, and the balance ($10,000), when the track shall be laid to or near the property of this company and trains running thereon. Provided, however, that the charges for transportation of coal and iron ore shall in no event exceed sixty-two and one-half (62½) cents per ton of 2,000 pounds, for any distance not above forty miles, but shall guarantee that this company shall have any facility and rates of freight given to the most favored.

A motion that Messrs. G. P. Bowler and G. K. Shoenberger be a committee to advise with the officers on the contract, was unanimously adopted.

JOHN CARLISLE, *Sec'y.*

Office Gt. W. M. & M. Co., room 17, Carlisle, building.

CINCINNATI, *April 20th*, 1878.

A called meeting of the board of directors of the Gt. W. M. & M. Co., held this day at 11 o'clock a. m.

Present: Messrs. G. K. Shoenberger, Peter Shoenberger, G. W. Carlisle and John Carlisle.

On motion, Mr. G. K. Shoenberger took the chair.

Minutes of last meeting were read and approved.

139 The secretary feelingly called attention of the board to the great loss sustained by the company in the death of Mr. Larz Anderson and Mr. G. P. Bowler. It was ordered that a notice of their decease be placed upon a separate page of the record.

Mr. L. Anderson, Jr., was chosen a director in place of the vacancy caused by the death of his father, L. Anderson, Sr.

Mr. G. K. Shoenberger was unanimously elected president of the board.

The secretary reported that the contracts for donation had been executed.

After some informal conversation, relation to the proposed railroad, the board adjourned subject to the call of the president.

JOHN CARLISLE, *Sec'y.*

In Memoriam.

The death of two members of our board, one, our honored and beloved president, ripe in years and goodness—a perfect man; the other, the proudest member of our board, suddenly called while in the buoyancy of youth, are losses too grave and sad to be expressed in words and resolutions, and a simple recital of the fact placed upon our records bears testimony to our great sorrow, mindful that silence is eloquent.

JOHN CARLISLE, *Sec'y.*

Office Gt. Western Mining & Manfg. Co., room 17, Carlisle building.

CINCINNATI, *July 24th*, 1878.

Special meeting of the board of directors.

Present: Messrs. G. K. Shoenberger, Peter Shoenberger, G. W. Carlisle and John Carlisle.

The minutes of the last meeting were read and approved.

The president stated the object of the meeting was to choose a director in place of Mr. G. P. Bowler, deceased.

On motion, Mr. R. B. Bowler unanimously elected a director of this company.

The secretary stated that in order to secure certain donations to the proposed Chattaroi Ry. it would be necessary to locate the railroad between Ashland and Catlettsburg before Sept. 12th, 1878.

140 On motion of Mr. Peter Shoenberger, it was resolved to appropriate $600 (said amount to be assessed *pro rata* among the stockholders) the Chattaroi Railway Co. to enable that company to secure a permanent location of the railroad from Ashland to Louisa, Ky. Provided, that Mr. Larz Anderson consents to pay his proportion of the same.

The superintendent of the company, Mr. G. S. Richardson, made the following reports:

"I think it advisable that the Great Western Mining and Manufacturing Co. should purchase the tract of 600 acres now owned by Judge Borders adjoining the company's land. Your company owns the coal privileges on said tract, but the time is coming when they will want the timber for mining purposes, and if the purchase is delayed there is danger of losing the opportunity, for I am satisfied the heirs of Judge Borden will not sell. The Judge will sell the land to the company for three dollars ($3.00) per acre."

On motion adjourned.

JOHN CARLISLE, *Sec'y.*

Office Gt. Western Mining & Mfg. Co., room 17, Carlisle building.

CINCINNATI, *Feb'y* 10, 1879.

Special meeting of the board of directors called by the president.

Present: Messrs. Anderson, G. W. Carlisle, Peter Shoenberger and Jno. Carlisle.

Mr. Anderson was called to the chair.

The object of the meeting was stated to be the consideration of means to prevent the lapsing of the Chattaroi Railway charter.

Owing to the absence of the president and Mr. Bowler, the board adjourned to Wednesday, the 12th inst., at 11 a. m.

Mr. Carlisle reported that the final location of the railroad from Ashland, Ky., to our mines had been made by the Chattaroi Railroad Co., and the grades were very favorable and the work very light; distance, 46 miles.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office Great Western Mining & Mfg. Co., room 17, Carlisle building.

CINCINNATI, *Feb'y 12th*, 1879.

Adjourned meeting of the board of directors.

141 Present: Messrs. Anderson, Bowler, Peter Shoenberger, G. W. Carlisle and John Carlisle.

On motion Mr. Anderson took the chair.

Mr. Carlisle stated that the condition of the Chattaroi Railway charter requires that work should be commenced in good faith before Feb'y 23d, 1879.

It was the unanimous opinion of the board that the Chattaroi Railway Co. has begun the work substantially, in compliance with the terms of the charter, by making a final location of the road and negotiating for the construction of the same, but in order to secure the rights of the charter beyond peradventure, it was resolved:

On motion of Mr. Peter Shoenberger, that this company appropriate an amount not exceeding $600 to the Chattaroi Railway Company to enable them to do such work as is necessary to comply literally with the terms of the charter.

Mr. J. Carlisle was requested to state what were the prospects of securing the construction of the railroad this year. He reported that sufficient means had been secured to order entire grading, tieing and trestling of the road-bed ready for the iron, and if money enough to pay for the bridges over Sandy, the iron and equipment could be obtained by loan or otherwise; the road could be put in operation within one year.

Each member of the board expresses himself favorabie to mortgaging the property of the Gt. Western Mining and Manufacturing

Co. as security for such loan as the Chattaroi Railway Co. might need for prosecuting the work.

On motion of Mr. Bowler, Mr. Carlisle was instructed to see if a loan could be obtained upon such security.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Great Western Mining & Manufacturing Company, room 17, Carlisle building.

CINCINNATI, *March 7th*, 1879.

Meeting of the directors of the G. W. M. & M. Co., held this day at 11 a. m.

Present: Messrs. P. Shoenberger, R. B. Bowler, L. Anderson and John Carlisle.

In the absence of the president, Mr. Anderson took the chair.

Minutes of the previous meetings read and approved.

142 Mr. Carlisle, to whom was referred the subject of obtaining loan for the Chattaroi Ry. on the lands of this company as security, reported no success.

A discussion ensued on the best plan of raising the means to secure the construction of the Chattaroi railway, all agreeing that this year the road should be built.

On motion adjourned.

JOHN CARLISLE, *Sec'y.*

Office of the Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *June 10th*, 1879.

A called meeting of the board of directors was held this day at 11 o'clock a. m.

Present: Messrs. Geo. K. Shoenberger, Peter Shoenberger, Larz Anderson, G. W. Carlisle, R. B. Bowler and John Carlisle.

The president stated the object of the meeting was to take into consideration the following paper, in order to secure from the Chattaroi Railway Company proper facilities for the shipment of coal and other products from the property of this company:

"In consideration of the signing of the agreement of which the foregoing is a copy (referring to the agreement of December 5th, 1877, by the company to make a donation of $20,000 to the Chattaroi Ry. Co.) by the Gt. Western Mining & Manufacturing Co., acting through its president and secretary the Chattaroi Ry. Co., owners of the railroad referred to in said agreement, doth hereby covenant and agree that upon the completion of said railroad, said railway company will at all times furnish suitable cars and other equipments to said Great Western Mining and Manufacturing Company for the transportation of the coal, iron ore, lumber and all other freight that

said last named company at any time wish to transport over said railroad or any part thereof, and to furnish said company like facilities for the transportation of freight over any part of said railroad when such part is finished for general use. And it is admitted by said railway company that the Great Western Mining & Manufacturing Company entered into the agreement referred to upon the assurance of receiving from said railway company such facilities for transportation as hereinbefore set forth.

"In witness whereof," etc., etc.

After some discussion it was unanimously resolved to sub-
143 mit a copy of the foregoing to Chattaroi Railway Company and respectfully request the adoption and execution of the same by their proper officers.

Mr. Carlisle reported that the dwelling house at Peach Orchard was sadly out of repair—roof rotten and leaking, walls in bad condition and foundation giving out, and that something ought to be done to preserve the house.

On motion of Mr. Anderson, it was resolved that Mr. Carlisle be authorized to repair the house at a cost not to exceed $200.

The president and Mr. R. B. Bowler were chosen as an executive committee to attend to the leasing of the mines, and other business.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office Gt. W. M. &. M. Co., room 17, Carlisle building.

CINCINNATI, *Jan. 13th*, 1880.

Called meeting of the board of directors of the Gt. W. M. & M. Co. 11 a. m.

Present: Messrs. G. K. Shoenberger, Peter Shoenberger, G. W. Carlisle, R. B. Bowler and John Carlisle.

Minutes of previous meeting read and approved.

Mr. John Carlisle made a report of the progress of the work on the Chattaroi railway, which was very favorable, the grading being finished on two-thirds of the line, and contracts executed for the balance of the work.

Within this year trains could be running to Peach Orchard.

On motion of Mr. Bowler, it was resolved to have a thorough topographical survey *and made* made of the property of this company, and Mr. J. Carlisle was appointed a committee of one to attend to it with power to employ a competent surveyor at a cost not to exceed $500.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *April* 16, 1880.

Meeting of the board of directors of the Gt. W. M. & M. Co., called for 11 a. m. this day.

Present: Messrs. G. K. Shoenberger, Peter Shoenberger, R. B. Bowler and John Carlisle.

Minutes of previous meeting read and approved.

Mr. Carlisle reported that in accordance with resolution
144 adopted at the last meeting, he had secured the services of Col. O. A. Forbes, the chief engineer of the Chattaroi Railway Company to survey the land of this company. Col. Forbes had run out all the lines, and was now engaged in making a topographical map of the same, which could probably be ready in a short time. While engaged in the work a vein of coal was discovered which was supposed to be the Peach Orchard vein, but on comparing elevations was found to be 33 feet higher. Further examination will have to be made to determine whether it is a separate, distinct vein.

Mr. Carlisle also reported that work was being vigorously prosecuted on the railway.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of the Great Western M. & M. Co., room 17, Carlisle building.

CINCINNATI, *August* 30, 1880.

A called meeting of the directors for 11 a. m. this day.

Present: G. K. Shoenberger, Peter Shoenberger and John Carlisle.

There being no quorum, meeting adjourned.

JOHN CARLISLE, *Sec'y.*

Office of the Gt. W. M. & M. Co., Carlisle building, room 17.

CINCINNATI, *Sept.* 13*th*, 1880.

A called meeting of the directors of the Gt. W. M. & M. Co., held this day at 11 a. m.

Present: Messrs. G. K. Shoenberger, Peter Shoenberger, R. B. Bowler, G. W. Carlisle and John Carlisle.

Minutes of the last meeting read and approved.

Mr. Carlisle reported that tracklaying would commence on the Chattaroi Ry. by October 1st next, and if the weather permitted would be completed to Peach Orchard by January 1st, 1881.

The subject of operating the mines came up for discussion, but no action was taken.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *Jan.* 11, 1881.

Called meeting of the directors of the Gt. W. M. & M. Co.

Present: Messrs. G. K. Shoenberger, Peter Shoenberger,
145 R. B. Bowler, Larz Anderson, G. W. Carlisle and John Carlisle.

Minutes of previous meeting read and approved.

Mr. John Carlisle reported that the Chattaroi Railway track was completed to Louisa, and that in accordance with the agreement made by this company, fifty per centum of the donation of twenty thousand dollars was due to the railroad company.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *Apr.* 9, 1881.

Called meeting of the board of directors of the Great Western Mining and Manufacturing Company, held this day at 11 a. m.

Present: Messrs. G. K. Shoenberger, P. Shoenberger, R. B. Bowler, Larz Anderson by Joe Anderson, G. W. Carlisle and John Carlisle.

Minutes of previous meeting read and approved.

Mr. John Carlisle reported that the Chattaroi railway, notwithstanding the severe winter weather, had the rails all laid to within a short distance of the head of Griffiths creek, and that the road would be completed by the tenth; regular trains had been running for some time between Ashland and Louisa, and would be put on about May 10th, between Ashland and Peach Orchard. A wagon road had been partly constructed between the store, situated on the Big Sandy river and the head of Griffiths creek, a distance of two miles, without the consent of this company.

On motion of Mr. Bowler it was unanimously

Resolved, That the Chattaroi Railway Co. be granted the right at their own expense to continue to completion the construction of a wagon road over the property of the Gt. W. M. & M. Co., so that goods can be hauled from the Big Sandy river to the railroad at Griffiths creek.

Mr. P. Shoenberger offered the following resolution, which was unanimously adopted:

Resolved, That in consideration of the benefits to be derived by this company, the Chattaroi railway be granted the right of way to construct the said railway through the property of the Gt. W. M. & M. Co. upon such line as may be hereafter adopted, and to use for such purpose a strip of land one hundred feet in width from a point where said railway enters said property to the point where it
146 leaves said property with the right to construct tunnels wherever necessary.

On motion of Mr. Shoenberger, it was unanimously resolved that in consideration of the service of Mr. John Carlisle in looking after the property of this company for the past seventeen years, this board recommend to the stockholders to compensate Mr. Carlisle for his service by voting him one hundred and fifty shares, fully paid up of the capital stock of this company.

After some discussion on the different plans of developing the mines of this company, Mr. Bowler moves that a committee of three, in connection with a board be appointed to visit the property of this company on the 10th of May next and report to the board what they consider the best plan adopted.

The president appointed Messrs. Bowler, Anderson and P. Shoenberger on the committee.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *May* 23, 1881.

Called meeting of the board of directors of the Great Western Mining and Manufacturing Co., held this day at 11 a. m.

Present: Messrs. G. K. Shoenberger, Peter Shoenberger, Larz Anderson, R. B. Bowler, G. W. Carlisle and John Carlisle.

Minutes of previous meeting read and approved.

The committee appointed to visit the mines, made the following report, which was approved and order-to be transcribed on the records.

In pursuance of the provisions of a resolution passed by the board at its meeting, April 9th, 1881, your committee proceeded in company with Mr. John Carlisle to visit the property of the company at Peach Orchard.

They left here on the boat, Tuesday evening, May 10, and arrived at Ashland in time to catch the regular morning train on the Chattaroi railway for Louisa, from whence they continued their journey to Peach Orchard on the first regular train from Louisa to that point, arriving early Wednesday afternoon, a thing until this trip never heard of, viz: leaving Cincinnati one evening and arriving at the mines inside of twenty-four hours.

Your committee found the Chat-aroi Ry. completed from
147 Ashland to within about half a mile of the Peach Orchard property, and that only delayed by the construction of a tunnel through the mountain.

The railway is in good condition for so new a line, and after the summer's work should be in condition to handle all the traffic that will be offered to it.

Your committee understand that by early autumn the tunnel will be completed and the road finished to the mines, so that by the time our company can make its arrangements to mine, the means of transportation will be at hand.

Your committee rode over the greater part of Peach Orchard tract on horseback with Mr. Geo. S. Richardson, who is perfectly familiar with it all. The land is well covered with timber, white oak and poplar predominating, with some good hickory and ash, together with other trees of little commercial value, such as beech, chestnut, etc. The timber appears to be untouched, except in some few of the valleys and side hills, where it has been cut to build houses, boats, etc.

The old mines, into one of which your committee entered, although unused for years, are still in a remarkable state of preservation, being almost entirely free from debris and rubbish, showing the roof to be most excellent. The vein is seven feet in height from floor to roof, with three small partings of slate, leaving sixty-seven inches of clear coal in four seams, viz., fifteen inches, twenty-six inches, fourteen inches and twelve inches. This your committee saw in the old mines on Millers branch, and were assured by Mr. Richardson, who has exposed the vein on nearly every side hill that it runs evenly like this towards the back of the property, while it decreases towards the river and the north end, which your committee were able to verify by an examination of the old entrance on the river front where it is only about twenty-four inches, and at the railway tunnel where the vein is better than on the river, but not so good as the old mine in Millers branch.

The old miners' houses, when still standing, are mostly in a decayed condition, and except those near the river (which could be repaired and made habitable), are practically worthless.

Your committee have not been able to get as satisfactory information as they should like in regard to the cost of mining and marketing the coal, but were informed that the following would be nearly correct:

148	Mining, per ton	80c.
	Loading on cars, etc., at mines	10c.
	Transportation to river	50c.
	Loading on barges, etc	10c.
	Towing to Cincinnati	20c.
	Contingencies, say	10c.
	Total	$1.80

or, at the outside, say $2.00 per ton to Cincinnati. Youghiogheny is now quoted at $2.80 per ton; Kanawaha at $2.24.

Your committee were well pleased with their visit to the property; believe it to be very valuable and capable of being made to yield a good return upon the money invested, if properly developed and managed.

Your committee feels some hesitation in making any specific recommendation, believing it to be their duty to state the facts and circumstances only, leaving the board to come to its own conclusions;

nevertheless they are rather of the opinion that if the property could be leased on a satisfactory royalty to responsible parties with proper guarantee it would be the most satisfactory manner of disposing of the property, and suggest that a committee of the board be appointed to call the attention of coal men to the property, and see what propositions can be obtained before considering the question of developing the mines ourselves.

(Signed) R. B. BOWLER.
(Signed) P. SHOENBERGER.

Cincinnati, May 23, 1881.

On motion, the following committee was appointed to receive propositions for leasing mines: Messrs. Bowler, P. Shoenberger and John Carlisle.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *June* 8, 1881.

Called meeting of board of directors of Gt. W. M. & M. Co. held this day at 11 o'clock a. m.

Present: Messrs. R. B. Bowler, P. Shoenberger, Larz Anderson, G. W. Carlisle and John Carlisle.

Mr. P. Shoenberger was called to the chair.

Minutes of last meeting were read and approved.

The committee on leasing mines reported that it would be necessary to make improvements before leasing, and recommended
149 borrowing twenty thousand dollars ($20,000) for that purpose. The following resolution offered by the committee was unanimously adopted:

Resolved, That the secretary be authorized to borrow twenty thousand dollars ($20,000) from the stockholders of this company for the purpose of building a store, repairing house, building miners' houses to accommodate 100 miners, opening entries, constructing tipples, screens, scales, sidings, buying necessary cars and iron, and salary of superintendent, and that the secretary of this company shall give the notes of this company for the amount borrowed, payable on demand and bearing 6 per cent. interest, payable annually.

The calls for the loans to be made in installments of $2,000, upon the certificates of the secretary, that such amount is regained.

Resolved, That the secretary be authorized to employ a competent man to superintend the work.

On motion adjourned.

JOHN CARLISLE, *Sec'y.*

Office Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *Nov.* 23*d*, 1881.

Called meeting of the board of directors of the Gt. W. M. & M. Co. Present: R. B. Bowler, Larz Anderson, Geo. K. Shoenberger, Peter Shoenberger, G. W. Carlisle and John Carlisle.

Minutes of the last meeting read and approved. Mr. John Carlisle stated the object of the meeting was to receive the report of the committee on leasing the mines. The chairman states that from the best information obtained that 15 cents per ton was the best royalty paid on mines, that were prepared with houses, store, tracks and openings; that one of the committee had corresponded with parties in Pittsburg without definite result. That Daniel Stone, of this city, would probably make a proposition, but desires that this company would intimate what price would be favorably entertained.

On motion, report was ordered transcribed with records. Mr. Anderson moved, and it was adopted, that ½c. per bushel would be a fair royalty.

The secretary called for $5,550 to pay for improvements made under the resolution of June 9th, 1881.

150	Mr. L. Anderson agreed to loan the company.....	$1,500
	Mr. G. K. Shoenberger agreed to loan the company...	1,500
	Mr. R. B. Bowler agreed to loan the company.....	2,500
	Total	$5,500

for which the secretary was authorized to give the notes of the company, upon receipt of the money, payable on demand, with 6 per cent, interest.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *Jan.* 26*th*, 1882.

Called meeting of the board of directors of the Great Western Mining & Manufacturing Co.

Present: Messrs, Bowler, P. Shoenberger, John Carlisle and G. W. Carlisle. Mr. Bowler called to the chair. Minutes of last meeting read and approved.

Messrs. R. B. Bowler and John Carlisle reported the following by-laws, which, on motion, was adopted and ordered placed on the records:

By-Laws.

1st. The annual meeting of the stockholders of this company shall be held on the third Tuesday in March of each and every year, for the election of officers, and such other business as may be presented.

2d. The general offices of the company shall be in Cincinnati, State of Ohio, with a branch office at Peach Orchard, Lawrence county, State of Kentucky.

3d. The officers of the company shall consist of a president, secretary and treasurer.

4th. It shall be the duty of the president to preside at all meetings of the board and to perform such other duties as may be imposed upon him by the by-laws and resolutions of the board, enforce the same, and call a meeting of the board whenever he may deem it necessary or whenever requested to do so by any two members of the board.

5th. The secretary and treasurer may be one and the same person.

151 6th. The secretary shall keep a regular record of the proceedings of the board; to superintend, in conjunction with the president, the issuing of certificates of stock, and keep a stock ledger.

7th. It shall be the duty of the treasurer to keep an accurate account of all moneys received and paid out for the use of the company; his books shall at all times be open for the inspection of any members of the board.

He shall give bond for the faithful performance of his duties, should the board require it of him, and in such amount and form as this board may call for.

8th. The board shall appoint a manager who shall reside on the company's property in Lawrence county, Ky., and who shall have general charge and control of the property.

9th. A majority of the board shall constitute a quorum, and shall be competent to transact business.

10th. The election of officers of the board shall be at the first meeting of the board after its election or as soon thereafter as may be convenient.

11th. The salaries and compensation to be allowed to the officers of the company shall be fixed by the board of directors.

12th. Certificates of stock shall be issued to the owner of any number of shares of the capital stock of the company, which may be paid up in full, and such certificates shall be under the corporate seal of the company, and be signed by the president and the secretary.

13th. Stock may be assigned by transfer on the books of the company on the surrender of the former certificates for such stock, and not otherwise.

14th. No amendment or alteration of these by-laws shall be made except by a majority of the whole board.

The committee on leasing mines reported

"That they had only received one proposition, and that from Daniel Stone, to lease the mines on a royalty of 12c. per ton of coal mined, provided the company expend the sum of twenty thousand ($20,000) dollars on improvements, subject to his direction.

On motion the report was laid on the table until the next meeting of the board.

The secretary reported that he had called on December 15th 1881, for $5,000, to pay for improvements under the resolu-
152 tion of June 9th, 1881, and that Mr. Larz Anderson had advanced $1,500, and Mr. Bowler $2,000. He also reported that he had given the following notes for loans at the mines, viz:

To R. B. Bowler, note, date Nov. 23d, 1881, on demand, 6 per cent. for $2,500.

To Larz Anderson, note, date Nov. 23d, 1881, on demand, 6 per cent., for $1,500.

To G. K. Shoenberger, note, date Nov. 26, 1881, on demand, 6 per cent., for $1,500.

To Larz Anderson, note, date Dec. 17, 1881, on demand, 6 per cent., for $1,500.

To R. B. Bowler, note, date Dec. 19, 1881, on demand, 6 per cent., for $2,000.

Report accepted and approved.

Adjourned to meet Feb. 14th, at 12 m.

JOHN CARLISLE, *Sec'y.*

Office Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *Feb. 14th*, 1882.

Adjourned meeting of the board, held this day at 12 m.

Present: P. Shoenberger, R. B. Bowler, G. W. Carlisle and John Carlisle.

Peter Shoenberger called to the chair. Minutes of last meeting read and approved. The chair stated the business before the board was the report of committee on leasing the mines.

The committee further reported that Mr. Stone, whose proposition for leasing has been presented to this board, had consented to modify his proposition by agreeing to pay 12 cents per ton royalty for the first period of ten years, and 14 cents per ton royalty for the second period of ten years, and would agree to forfeit the lease, if, at the end of two years the average daily output of the mines did not amount to three hundred tons.

After some discussion the report was made the special subject of the next meeting.

Adjourned to meet Tuesday, Feb. 21, at 12 m.

JOHN CARLISLE, *Sec'y.*

Office Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *Feb.* 21*st*, 1882.

Adjourned meeting of the board, held this day at 12 m.
153 Present: Messrs. L. Anderson, R. B. Bowler, G. W. Carlisle and John Carlisle.

Larz Anderson called to the chair. The secretary stated the object of the meeting to take some definite action on leasing the mines.

The report of the committee having been read again, on motion of Mr. G. W. Carlisle, it was resolved to submit the proposition of Mr. Stone to the stockholders, at the annual meeting, to be held March 21st next, with the recommendation from this board that the same be approved.

JOHN CARLISLE, *Sec'y.*

CINCINNATI, *March* 21*st*, 1882.

Office Great Western Mining & Mfg. Co., room 17, Carlisle building.

In pursuance of the following written notice, served on each stockholder of the Gt. W. M. & M. Co., viz.:

(Dated) CINCINNATI, *Feb.* 21*st*, 1882.

DEAR SIR: The annual meeting of the stockholders of the Gt. Western Mining and Manufacturing Company for the election of seven directors to serve the ensuing year, or until the successors are elected, and for the transaction of any other business which may be presented, may be held at the office of the company, room No. 17, Carlisle building, at 11 a. m., Tuesday, March 21st. Polls open from 11:30 to 12 m.

Respectfully, JOHN CARLISLE, *Sec'y.*

The stockholders met at the hour named and organized by choosing R. B. Bowler, chairman, and John Carlisle, secretary. On motion of Mr. P. Shoenberger, the meeting adjourned to Saturday, March 25th, at 11:30 a. m., in order to insure a large representation of the stock.

JOHN CARLISLE, *Sec'y.*

Office Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *March* 25*th*, 1882.

The adjourned annual meeting of the stockholders of the Gt. W. M. & M. Co. was held this day. R. B. Bowler, chairman, and John Carlisle, sec'y.

Minutes of the previous meeting read and approved. 1,558 shares of stock out of a total of 1,880 shares was represented.

154 A communication from the board of directors was read, recommending the stockholders to approve of leasing the mines of the company to Daniel Stone for twenty years at a royalty of 12c. per ton the first ten years, and 14c. per ton royalty the second ten years; approved.

On motion of Mr. Anderson, the following was passed unanimously:

Whereas, the board of directors have passed a resolution recommending that one hundred and fifty shares of paid-up stock of this company be issued and delivered to John Carlisle for his services in taking care of the property for the last seventeen years, which resolution meets the approval of the stockholders; therefore,

Resolved, By the stockholders of the Great Western Mining and Manufacturing Company that the directors of said company are hereby authorized and requested to issue and deliver to said John Carlisle one hundred and fifty shares of the capital stock of this company, paid up in full in consideration for his services rendered the company in caring for the property in the past seventeen years.

On motion of Mr. Anderson, it was

Resolved, That the stockholders of this company approve the recommendation of the directors in relation to leasing the mines of this company, and hereby authorize the board of directors to enter into a contract with Daniel Stone to lease the mines substantially in accordance with terms as reported by the board.

On motion of Mr. Carlisle, ballots were taken for directors to serve the ensuing year, or until their successors are elected, with the following result, Dr. J. L. Anderson and Peter Shoenberger acting as judges:

Fifteen hundred and fifty-eight shares of stock were voted, of which

Larz Anderson received	1,558 votes.
R. B. Bowler received	1,558 votes.
Dr. J. L. Anderson received	1,558 votes.
Peter Shoenberger received	1,528 votes.
E. H. Pendleton received	1,558 votes.
G. W. Carlisle received	1,558 votes.
John Carlisle received	1,558 votes.
G. K. Shoenberger received	30 votes.

155 Whereby Larz Anderson, R. B. Bowler, Dr. J. L. Anderson, Peter Shoenberger, G. W. Carlisle and John Carlisle were declared elected directors of the Gt. W. M. & M. Co. of Ky.

Adjourned.

JOHN CARLISLE.

Office Gt. W. M. & M. Co. of Ky., room 17, Carlisle building,

CINCINNATI, *April* 30, 1882.

The following members of the board of directors, Larz Anderson, Dr. J. L. Anderson, Peter Shoenberger, G. W. Carlisle, R. B. Bowler and John Carlisle, being present, proceeded to organize.

Dr. J. L. Anderson was called to the chair, and John Carlisle appointed secretary.

After reading the minutes of the stockholders' meeting, the board proceeded to elect officers. R. B. Bowler was elected president unanimously, and John Carlisle was elected secretary and treasurer unanimously.

On motion of Mr. Shoenberger, the officers were directed to prepare a lease of the mines with Daniel Stone.

No further business, adjourned.

JOHN CARLISLE, *Sec'y.*

Office Gt. W. M. & M. Co., room 17, Carlisle building,

CINCINNATI, *Nov.* 6, 1882.

Called meeting of the board of directors of the Gt. W. M. & M. Co., held this day at 12 m.

Present: Messrs. Anderson, Bowler, Shoenberger, G. W. Carlisle and John Carlisle.

Minutes of previous meeting read and approved.

The secretary reported that the improvements at the mines had progressed favorably, over forty houses having been constructed, about 1,000 feet of entries driven, rooms turned, and the tipple was almost completed.

By January 1st next the company would be prepared to ship coal to the Ohio mill markets. Over $20,000 had been expended, a detailed statement of which would be prepared and submitted at the annual meeting. On motion, a call was made for a loan of $10,137.68 from the stockholders.

R. B. Bowler advanced on the 4th	$3,000.00
Geo. K. Shoenberger advanced on the 6th	4,318.84
Larz Anderson advanced on the 4th, by John Carlisle	2,818.84

156 For which the following notes were authorized to be signed by the secretary and handed to the respective parties:

Note, date Nov. 4, 1882, one day, 6 per cent. to R. B. Bowler	$3,000.00
Note, date Nov. 6, 1882, one day, 6 per cent. to Geo. K. Shoenberger	1,500.00

Note, date Nov. 6, 1882, one day, 6 per cent. to Geo. K. Shoenberger	2,818.84
Note, date Nov. 4, 1882, one day, 6 per cent. to Larz Anderson	2,818.84
Total	$10,137.68

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *March 20th*, 1883.

In pursuance to the following written notice, mailed to each stockholder of the Gt. W. M. & M. Co.:

Dated "CINCINNATI, *Feb. 25th*, 1883."

"DEAR SIR: The annual meeting of the stockholders of the Great Western Mining and Manufacturing Company of Ky. will be held on March 20th next, at 11 a. m., at the office of the company, room 17, Carlisle building, Cincinnati, O., for the purpose of electing seven directors and for such other business as may be presented."

The following stockholders met at the appointed time and place: Larz Anderson, Dr. J. L. Anderson, R. B. Bowler, Peter Shoenberger, G. W. Carlisle, Geo. S. Richardson and John Carlisle, representing 1,330 shares out of a total of 2,000 shares issued.

On motion, Mr. L. Anderson was chosen chairman, and John Carlisle secretary.

Minutes of the previous meeting read and approved.

Mr. Richardson, the superintendent, reported that the mines were now in working order, all the necessary improvements being completed, and that he was shipping 200 tons of coal daily. In order to do a profitable business, the working capital should be largely increased, so that more houses could be erected, and other mines opened. An output of 1,000 tons daily would increase a net profit to the company of $45,000 per year.

157 A committee, consisting of the president and secretary, were requested to get the signatures of the stockholders to an agreement to reduce the capital stock one half, so as to provide by the selling of the relinquished stock sufficient working capital to mine on a large scale.

On motion of Dr. Anderson, the meeting proceeded to ballot for directors, Dr. Anderson and Peter Shoenberger being appointed tellers. Thirteen hundred and thirty votes were cast, of which

R. B. Bowler received	1,330
Larz Anderson received	1,330
Dr. J. L. Anderson received	1,330
Peter Shoenberger received	1,330
E. H. Pendleton received	1,330
G. W. Carlisle received	1,130
John Carlisle received	1,330

whereby R. B. Bowler, Larz Anderson, Dr. J. L. Anderson, Peter Shoenberger, E. H. Pendleton, G. W. Carlisle and John Carlisle were declared elected directors of the Gt. W. M. & M. Company of Ky.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of the Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *M'ch 20th*, 1883.

The following members of the board of directors of the Gt. W. M. & M. Co., having been elected this day, met on adjournment of the stockholders to organize.

Messrs. R. B. Bowler, Larz Anderson, Dr. J. L. Anderson, Peter Shoenberger, G. W. Carlisle and John Carlisle.

Dr. Anderson was chosen chairman and John Carlisle secretary.

There being no opposition, R. B. Bowler was elected president, and John Carlisle secretary and treasurer. Mr. Richardson was continued as superintendent.

Mr. Carlisle, the treasurer, submitted a detailed financial report of the company:

The total expenditures were, including interest.....	$49,803.47
And the receipts from all sources, including interest.....	23,609.05
Balance due the treasurer.....	$26,194.42

158 On motion of Mr. Shoenberger, the president and Dr. J. L. Anderson were appointed a committee to audit the accounts of the treasurer, and report to the next meeting of the board.

Adjourned to the call of the president, to hear the report of the auditing committee.

The treasurer reported that the notes authorized at the last meeting has been delivered.

Office of the Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *April* 30, 1883.

Meeting of the board of directors held this day at 12 m.

Present: Messrs. L. Anderson, Dr. J. L. Anderson, R. B. Bowler and John Carlisle.

Minutes of previous meeting read and approved.

The auditing committee, Mr. R. B. Bowler and Dr. J. L. Anderson, to whom was referred the accounts of the treasurer, reported that they had carefully examined the account and vouchers, and had also made a personal examination of the improvements on the company's property and found everything perfectly correct.

The total expenditures were		$48,105.27
Interest on same averaged		1,698.20
Total		$49,803.47
The receipts in cash were	$3,565.47	
From loans, for which the notes of the company were given were	19,137.68	
Interest on same	905.90	
		23,609.05
Leaving due the treasurer		$26,194.42

for which they recommended a note be given to John Carlisle payable three years after date with interest. Report approved; on motion the president was authorized to execute and deliver to John Carlisle the note of the company, for $26,194.42 payable three years from March 1, 1883, with interest, or sooner. The president was also directed to take up the other notes of the company and give new ones dated same as Mr. Carlisle's and payable in three years with interest.

JOHN CARLISLE, *Sec'y.*

159 The following additional

By-Laws

were unanimously adopted.

No. 15. Regular meetings of the board of directors shall be held on the fourth Monday of each month, due notice of which shall be given by the secretary in writing.

No. 16. The secretary shall prepare monthly reports of the receipts and expenses, statement of coal mined and sold, and balance sheet showing the company's financial condition, to be submitted at the regular meeting of the board.

No. 17. No liabilities shall be incurred or expenditures made other than the ordinary operating expenses without a previous order of the board.

Office of Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *Apr.* 30, 1883.

Regular monthly meeting of the board.

Present: L. Anderson, Dr. J. L. Anderson, Peter Shoenberger and John Carlisle.

Dr. J. L. Anderson was called to the chair.

Minutes of the last meeting read and approved.

The committee to contract with D. Stone & Co. to sell the Peach Orchard coal in the vicinity reported progress; the committee were continued.

The secretary submitted a balance sheet, and statement of earnings and expenditures for the month of March, which was approved and ordered filed.

The secretary reported that eight barges in first-class condition could be rented from the Queen City Coal and Mining Company on a lease for six months at the rate of $1.50 per day, and that it was necessary that this company should have some barges under their control in order to do a successful coal business.

On motion of Dr. Anderson the secretary was authorized to secure a lease of the Q. C. C. & M. Co. barges at a rental not to exceed $1.50 per day, for six months, with the privileges of six months longer.

JOHN CARLISLE, *Sec'y*.

160 Office of the Gt. W. M. & M. Co., room 17, Carlisle building.

CINCINNATI, *May* 14, 1883.

Called meeting of the board of directors held this day at 12 m.

Present: R. B. Bowler, Dr. J. L. Anderson, G. W. Carlisle and John Carlisle.

Minutes of the last meeting read and approved.

The president stated that the object of the meeting was to provide means to meet the pay rolls for March and April which would require about $7,000.

After some discussion it was resolved that the president be authorized to execute the note of this company for seven thousand dollars dated to-day and payable four months after date, and that the treasurer be authorized to negotiate the same.

Adjourned.

JOHN CARLISLE, *Sec'y*.

Office of Gt. W. M. & M. Co, room 17, Carlisle building.

CINCINNATI, *May* 28, 1883.

Regular meeting of the board of directors held this day at 12 m.

Present: Larz Anderson, Dr. J. L. Anderson, G. W. Carlisle and John Carlisle.

Minutes of last meeting were read and approved.

The secretary reported he had not yet received the statement of earnings and expenses or the balance sheet from Ashland for the month of April. He was requested to have it ready by the next regular meeting.

The treasurer reported that he had negotiated the $7,000 note authorized at the last meeting but was compelled to endorse it individually.

The discount amounted to.....	$207.27
And the net proceeds were.....	6,792.73
	$7,000.00

Approved—

The secretary reported that he had secured the lease of the eight barges belonging to the Q. C. C. & M. Co., at rental of thirty-five dollars each per month for three months from the time of delivery with the privilege of an additional three months at the same rental.

161 The report was approved and the president authorized to execute the contract.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

CINCINNATI, *June* 25, 1883.

Regular meeting of the board of directors.

Present: Messrs. G. W. Carlisle, Peter Shoenberger and John Carlisle.

No quorum.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

CINCINNATI, *July* 23, 1883.

Regular meeting of the board of directors.

Present: Messrs. G. W. Carlisle and John Carlisle.

No quorum.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

CINCINNATI, *Aug.* 27, 1883.

Regular meeting of the board of directors.

Present: Messrs. Bowler, L. Anderson, J. L. Anderson, G. W. Carlisle and John Garlisle.

Minutes of previous meetings read and approved.

No reports for July were received, but the June report of mining was read, and some disappointment expressed that there was still a loss, which Mr. Carlisle explained was necessary so long as the output of coal was not increased, and that could not be done without a further increase of working capital, and he referred to his report of March, 1882.

The secretary stated that the note for $7,000 given May 14, 1883, and payable in 4 mos. he would owe Sept. 17th next and there was no fund with — to pay it. On motion of Mr. Anderson the president was authorized to execute another note for $7,000 date Sept. 15th,

and payable in 4 mos. which the secretary was directed to negotiate the sale of and with the proceeds take up the note due the 17th Sept.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

CINCINNATI, *Sept.* 24, 1883.

Regular meeting of the board of directors.
162 Present: Messrs. G. W. Carlisle and John Carlisle.
No quorum
Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

CINCINNATI, *Oct.* 22, 1883.

Regular meeting of the board of directors.

Present: Messrs. Bowler, Schoenberger, L. Anderson, J. L. Anderson, G. W. Carlisle and John Carlisle.

Minutes of previous meetings read and approved.

Reports of operations of the mines for July, August and September were read. Still losing money. All members of the board except G. W. Carlisle and John Carlisle, declined to advance any more money for working the mines.

The secretary reported he had been unable to induce any one to discount the note for $7,000 authorized at the last meeting and that he had been compelled to pay the note due Sept. 17th out of his private funds. No one volunteered to share the burden with the secretary.

Adjourned subject to the call of the secretary.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

CINCINNATI, *Nov.* 14, 1883.

Called meeting of the board of directors held this day.

Present: Messrs. Bowler, Shoenberger, Larz Anderson, J. L. Anderson, G. W. Carlisle and John Carlisle.

Messrs. Bowler, Shoenberger and Anderson having stated that they were about all selling their stock, tendered the resignations of Peter Shoenberger, J. L. Anderson and E. H. Pendleton as members of this board, which were accepted, and Messrs. G. S. Richardson, L. Hinsdale and B. D. Harris were unanimously chosen to fill the

vacancies. Mr. R. B. Bowler tendered his resignation as president to take effect upon adjournment.

On motion, Mr. G. S. Richardson was chosen president *pro tem.*

Adjourned to meet Nov. 15 at 11 a. m.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

CINCINNATI, *Nov.* 15, 1883.

Adjourned meeting of the board of directors held this day at 11 a. m. G. S. Richardson, pres't *p. t.* in chair.

163 Minutes of previous meetings read and approved.

Present: Messrs. L. Anderson, G. W. Carlisle, John Carlisle, G. S. Richardson and Hinsdale and B. D. Harris.

Mr. Larz Anderson tendered the resignations of himself and Mr. R. B. Bowler as directors which were accepted, and Mr. G. D. Harris, of Vermont, and Jas. C. Holden, of New York, were chosen to fill the vacancies.

It being necessary to choose a president in place of R. B. Bowler resigned, Mr. B. D. Harris, of Vermont, was unanimously elected.

On motion, article 3 of the by-laws was amended to read: "The officers of the company shall consist of a president, vice-president, secretary and treasurer.

Mr. Geo. S. Richardson, of Ashland, Ky., was unanimously chosen vice-president.

The president submitted a communication from F. H. Oliphant of Pennsylvania stating the terms on which he would accept the position of general manager of the mines and business of this company, viz.: for one year at a salary of $250 per month. On motion, the appointment of Mr. Oliphant on the terms proposed was agreed to and the president was authorized to notify him to take charge Dec. 1st, 1883.

On motion, the 1st article of the by-laws was changed so that it would read that the annual meeting of the stockholders would take place on the Wednesday preceding the third Thursday of February of each year.

The following resolution offered by Mr. G. D. Harris was unanimously adopted on a call of ayes and noes.

Whereas, it is desired to more thoroughly develop, and so largely increase the production of the mines of Peach Orchard, and to accomplish this end more working capital is necessary; therefore, be it

Resolved, That this company will issue sixty mortgage bonds of the denomination of one thousand dollars each, to bear date January 1st, 1884, and to be payable in the city of New York January 1, 1894, with interest at the rate of seven per cent. per annum, payable semi-annually, also in New York on the first day of July and January in each year, said interest to be represented by suita-

ble coupons attached to said bonds. And to secure the payment of said bonds, principal and interests, it is further

Resolved, That a first mortgage be put upon the franchises and entire property of this company both real and personal, con-
164 ditioned for the prompt payment of said bonds and interest when due, said mortgage to be made to some proper person or persons, to be hereafter designated by this board, to act as trustees for the holders of said bonds.

Resolved, That John Carlisle is hereby appointed a committee to procure a draft of a proper form of bond and mortgage to carry out the preceding orders; said drafts to be submitted to this board at a future meeting for approval, and that when so approved, the president and secretary be and hereby are authorized to sign and execute said mortgage and said bonds.

Adjourned to meet Saturday, Dec. 1st, at 11 a. m.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

CINCINNATI, *Dec.* 1, 1883.

Adjourned meeting of the board of directors of this company held this day at 11 a. m.

Present: Messrs. Richardson, G. W. Carlisle, John Carlisle and L. Hinsdale.

Minutes read and approved.

Vice-President Richardson in the chair.

The secretary submitted a printed form of mortgage and bonds as instructed by the board at its last meeting. The same being carefully read and discussed was unanimously approved and directed to be filed.

Mr. Reuben Tyler's, attorney, bill of fifty dollars for preparing and writing the same, was approved and ordered to be paid.

The secretary stated that he had contracted with the Krebs Lithographing Co. to engrave sixty bonds of $1,000 each, with the coupons, for the sum of sixty dollars. The action of the secretary was approved.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

CINCINNATI, *Dec.* 24, 1883.

Regular meeting of the board of directors of the company held this day.

Present: Messrs. Richardson, Hinsdale, G. W. Carlisle and John Carlisle.

Vice-President Richardson in the chair.

Minutes read and approved.

On motion, article 15 of the by-laws was amended to read:
165 "Regular or special meetings of the board shall be held when called by the president, vice-president, or two members of the board." Adopted unanimously.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

NEW YORK, *Feb.* 20, 1884.

In pursuance of the regular call of the president and secretary, the annual meeting of the stockholders of the Great Western Mining and Manufacturing Co. was held at its office, No. 218 Fulton St., New York, this day at 2 p. m.

B. D. Harris, Esq., president in the chair and Jas. C. Holden in the absence of the secretary, was chosen secretary *pro tem.*

It being ascertained that several of the heavy stockholders would not be present, being prevented by the great flood in the Ohio valley, it was voted to adjourn subject to a new call to be issued by the secretary.

Adjourned.

B. D. HARRIS, *Pres.*

JOHN CARLISLE, *Sec'y.*

ASHLAND, KY., *Apr.* 24, 1884.

Office of Gt. W. M. & M. Co.

An adjourned meeting of the stockholders of the Gt. W. M. & M. Co., in accordance with a written notice served upon each stockholder of the company was held at the office in Ashland, Ky., this day at 9:30 a. m.

Mr. B. D. Harris was chosen chairman and J. C. Holden secretary. The reading of the annual report was dispensed with. On motion the meeting proceeded to elect seven directors. Messrs. Richardson and G. W. Carlisle were appointed tellers. They reported 2,000 votes cast, of which

G. W. Carlisle received	2,000	votes.
G. D. Harris received	2,000	"
G. W. Carlisle received	2,000	"
John Carlisle received	2,000	"
Geo. S. Richardson received	2,000	"
J. C. Holden received	2,000	"
L. Hinsdale received	2,000	"

Whereupon, B. D. Harris, G. D. Harris, G. W. Carlisle, John Carlisle, Geo. S. Richardson, J. C. Holden and L. Hinsdale were
166 declared elected directors of the Great Western Mining & Manufacturing Company, to serve for one year or until their successors were elected and qualified.

Adjourned.

B. D. HARRIS, *Chairman.*

Office of Gt. W. M. & M. Co.

ASHLAND, KY., *Apr.* 24, 1885.

The following members elected this day as directors of the Gt. W. M. & M. Co., met for organization.

Messrs. B. D. Harris, G. D. Harris, G. W. Carlisle, G. S. Richardson, John Carlisle and Jas. C. Holden.

B. D. Harris was called to -he chair and J. C. Holden selected secretary.

After reading the minutes of the stockholders' meeting the board went into an election of officers.

B. D. Harris was elected president.

G. S. Richardson was elected vice-president and John Carlisle was elected secretary and treasurer.

On motion F. H. Oliphant was appointed general manager for the ensuing year.

Reports from the treasurer and general manager were read, accepted and ordered filed.

Mr. G. D. Harris submitted the following, which was unanimously adopted.

Resolved, That for the purpose of procuring additional plant and improvements including mining machines, so as to increase the production of the mines, the president and treasurer are hereby authorized and empowered to sell at par and accrued interest, not exceeding $30,000 of the first mortgage 7 per cent. bonds of the company, or in their discretion to borrow not exceeding $30,000 and to issue the company's notes therefor and to pledge as security an amount of said first mortgage bonds, equal to the amount so borrowed.

On motion, article 1 of the by-laws was amended to read that "The annual meetings of the stockholders shall be held on the fourth Thursday in April of each and every year.

B. D. HARRIS, *Pres't.*

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

PEACH ORCHARD, KY., *Jan.* 6, 1885.

Special meeting of the board of directors of the Gt. W. M. & M. Co., held this day at 11 a. m.

167 Present: Messrs. G. D. Harris, B. D. Harris, Geo. S. Richardson, G. W. Carlisle and John Carlisle.

The board having made a thorough examination of the mines and improvements, expressed themselves well pleased.

On motion of Mr. Harris the following was adopted.

Resolved, That the treasurer be and hereby is directed to pay from quarterly dividends of one and one-fourth (1¼) per cent. each of the capital stock of the company out of the earnings of the current year,

to be due and payable on the first days of April, July and October, in 1885, and the first day of January, 1886. *Provided*, That if in the opinion of the president and treasurer, it may be inexpedient to pay any of said dividends, they may suspend such payment until further action of the board in relation thereto.

B. D. HARRIS, *Pres't.*

JOHN CARLISLE, *Sec'y.*

ASHLAND, KY., *April* 23, 1885.

Office Gt. W. M. & M. Co.

The annual meeting of the stockholders, being called for to-day, the directors met at 9 a. m.

Present: Messrs. G. D. Harris, B. D. Harris, G. S. Richardson, G. W. Carlisle and John Carlisle.

Minutes of previous meeting read and approved.

The annual reports were read, and on motion they were directed to be submitted to the stockholders.

On motion adjourned.

B. D. HARRIS, *Pres't.*

JOHN CARLISLE, *Sec'y.*

ASHLAND, KY., *April* 23, 1885.

Office Gt. W. M. & M. Co.

The annual meeting of the stockholders of the Gt. W. M. & M. Co., held in pursuance of published notice, at 10 a. m.

Mr. G. D. Harris was chosen chairman, and John Carlisle, secretary.

Minutes of last meeting read and approved.

The annual report of the general manager was read, and upon motion was accepted and ordered filed. The other reports were ordered to be filed.

On motion, the meeting proceeded to elect directors. G. W. Carlisle and G. S. Richardson were appointed judges; 1,950 votes out of 2,000 were polled.

168 *rtificate of Election.*

"We hereby certify that G. D. Harris, John Carlisle, B. D. Harris, G. W. Carlisle, G. S. Richardson, J. C. Holden and L. Hinsdale have received 1,950 votes, being the total number cast, and they are hereby declared elected directors of the Great Western Mining & Manufacturing Co., to serve for one year, or until their successors are elected and qualified.

"G. D. HARRIS, *Chairman.*
"G. W. CARLISLE,
"G. S. RICHARDSON,
Judges.

"On motion adjourned.
"JOHN CARLISLE, *Sec'y.*"

We the undersigned directors of the Great Western Mining & Manufacturing Co., elected to serve for the ensuing year, or until our successors are elected and qualified, do each of us solemnly swear that we will severally, so far as the duty devolves on us, diligently and honestly administer the affairs of said Gt. Western Mining & Manufacturing Co., and that we will not knowingly violate or willingly permit to be violated, any of the provisions of the laws of Kentucky, under which said Gt. Western Mining & Manufacturing Co. has been organized, and that each of us is the *bona fide* owner in his own right of the number of shares of stock subscribed for by him, or standing in his name on the books of said Gt. Western Mining & Manufacturing Co.

JOHN CARLISLE.
B. D. HARRIS.
GEO. S. RICHARDSON.
G. D. HARRIS.
G. W. CARLISLE.

Sworn to before me this the 23d day of April, 1885.
Witness my hand and seal this day and year above written.

[L. S.] THOMAS RUSSELL,
Mayor of the City of Ashland.

ASHLAND, KY., *April* 23, 1885.

Office Gt. W. M. & M. Co.

Immediately after adjournment of the stockholders' meeting, the directors met for the purpose of organizing.

Present: Messrs. G. D. Harris, B. D. Harris, G. W. Carlisle, G. S. Richardson and John Carlisle.

169 Mr. Richardson was chosen chairman, and John Carlisle secretary.

The board at once proceeded to choose officers. Mr. B. D. Harris was unanimously elected president, Mr. G. S. Richardson was unanimously elected vice-president, and John Carlisle was elected secretary and treasurer; L. Hinsdale was appointed auditor.

GEO. S. RICHARDSON, *Chairman.*

JOHN CARLISLE, *Sec'y.*

ASHLAND, KY., *April* 22, 1886.

Office Gt. W. M. & M. Co.

The annual meeting of the stockholders of the Gt. Western Mining & Manufacturing Co. was held to-day at 10 a. m., in pursuance of the published notice.

Present: Messrs. B. D. Harris, G. S. Richardson, G. W. Carlisle, John Carlisle and G. D. Harris, by proxy.

Mr. B. D. Harris was chosen chairman, and John Carlisle, secretary.

The annual report of the treasurer was read, showing

Gross earnings for two years		$167,130.89
Expenses		158,249.28
Net earnings		$8,889.61
Add stock on hand Dec. 31, 1885		1,062.10
Net profits from store		2,495.19
Total net earnings		$12,418.90
Applied to pay interest on bonds	$3,140	
Applied to pay dividends on stock	4,000	
		7,140.00
Surplus		$5,278.90

The report was approved and ordered filed. Pending discussion to elect directors, a motion was made and carried that the election be dispensed with, and that the present board be continued in office until their successors are elected and qualified.

On motion adjourned.

B. D. HARRIS, *Pres.*

JOHN CARLISLE, *Sec'y.*

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ASHLAND, *April* 23, 1886.

Office Gt. W. M. & M. Co.

Regular called meeting of the board of directors held this day.

Present: Messrs. B. D. Harris, G. S. Richardson, G. W. Carlisle and John Carlisle.

The president stated that the stockholders at the annual meeting on the 22d, had held no election, but by resolution continued the present board of directors.

The general manager was directed to push the operations of mining so as to increase the output.

There being no further business, the meeting adjourned.

B. D. HARRIS, *Pres.*

JOHN CARLISLE, *Sec'y.*

CINCINNATI, *Nov.* 10, 1886.

Office Gt. W. M. & M. Co.

Called meeting of the board of directors, held this day at room 7, Carlisle building, at 3 p. m.

Present: Messrs. G. S. Richardson, G. W. Carlisle, L. Hinsdale and John Carlisle.

Vice-president in the chair, who reported that the health of Mr. O. C. Phelps, our general manager, was badly shattered, and he had given him an indefinite leave of absence, with the hope that the change of climate might greatly benefit him.

On motion, the action of the vice-president was approved, with instructions to notify Mr. Phelps that the board greatly regretted the cause for his absence, but hoped for his speedy restoration to health, and he would soon be able to resume his duties with this company.

Adjourned.

GEO. S. RICHARDSON, *V.-P.*

JOHN CARLISLE, *Sec'y.*

(1) ASHLAND, Ky., *April* 28, 1887.

Office Gt. W. M. & M. Co.

March 23d, 1887.

(2.) The annual meeting of the stockholders of the Gt. W. M. & M. Co., for the purpose of electing seven directors, and for the transaction of other business, will be held at the office of the company, in Ashland, Ky., on Thursday, April 28th, 1887, at 9 o'clock a. m.

JOHN CARLISLE, *Sec'y.*

171 (1.) The stockholders of the Great Western Mining & Manufacturing Co., of Ky., met this day at 9 a. m., in pursuance of the published notice for the annual meeting.

Mr. G. S. Richardson was called to the chair, and Mr. John Carlisle was appointed secretary.

Reading of the reports dispensed with. On motion of Mr. Hinsdale, it was resolved to dispense with an election of directors, and that the present board of directors be continued until their successors were elected and qualified.

Adjourned.

GEO. S. RICHARDSON, *Chairman.*

JOHN CARLISLE, *Sec'y.*

ASHLAND, KY., *May* 5, 1889.

Office Gt. W. M. & M. C.

Called meeting of the board of directors.

Present: Messrs. B. D. Harris, G. S. Richardson, G. W. Carlisle and John Carlisle.

The president stated that at the annual meeting of the stockholders, held on the 28th inst., there was no election, but by resolution of the stockholders, the present board were continued in office until their successors were elected.

The vice-president recommended that new mines be opened on Nats Ck., where the coal showed excellently, both in quality and thickness. Upon motion, the recommendation was accepted and

approved, and the vice-president was directed to open the new mines, the expense of which should be provided for out of the earnings of the company.

Adjourned to meet subject to the call of the president or secretary.

B. D. HARRIS, *Pres.*

JOHN CARLISLE, *Sec'y.*

NEW YORK, *Nov.* 10, 1887.

Called meeting of the directors of the Gt. Western Mining & Manufacturing Company.

Present: Messrs. B. D. Harris, G. D. Harris, J. C. Holden and John Carlisle.

The secretary and treasurer reported that the business at the mines was unusually good, and that owing to the long drouth and the unsurpassed facilities for supplying the markets with Peach Orchard coal by rail from the company's mines, that the profits had largely increased, and the only thing lacking was sufficient capital to enable the company to increase the output enough to meet
172 the demands. He also reported that a large amount had been expended this year for permanent improvements out of the earnings of the company, the total for the past three years amounting to over $50,000.

On motion of Mr. G. D. Harris, the president and secretary were authorized to call a meeting of the stockholders on January 11th, at Cincinnati, for the purpose of voting on an increase of the capital stock to the amount $50,000, to be divided *pro rata* among the stockholders, being the amount of net earnings expended in permanent improvements.

Adopted unanimously.

Adjourned.

B. D. HARRIS, *Pres.*

JOHN CARLISLE, *Sec'y.*

CINCINNATI, *Jan.* 11, 1888.

Office Gt. W. M. & M. Co.

In pursuance of a call made by the directors for a meeting of stockholders, to be held this day at 10 a. m., for the purpose of voting on increase of stock, there was present Messrs. Richardson, L. Hinsdale, John Carlisle and G. W. Carlisle, and proxies from B. D. Harris and G. D. Harris, representing 1,990 shares out of 2,000 shares.

Mr. G. S. Richardson was called to the chair, and Mr. John Carlisle was chosen secretary.

On motion of Mr. G. W. Carlisle, the following preamble and resolutions were adopted unanimously, 1,990 shares voting:

Whereas, there has been expended for permanent improvement and betterments, including barges, flats, opening of new mines

machinery, etc., during the past three years, the amount of $64,666.44, all of which sum has been furnished from the net earnings of this company.

Resolved, That the stockholders, being entitled to this amount, the president and secretary are authorized and directed to issue five hundred shares of stock of this company, to be divided *pro-rata* among the stockholders of this company as follows:

To B. D. Harris, one hundred and fifty shares.
To G. D. Harris, one hundred and fifty shares.
To John Carlisle, one hundred and ten shares.
To G. W. Carlisle, seventy-five shares.
To Geo. S. Richardson, thirteen shares.
173 To Jas. C. Holden, one share.
To L. Hinsdale, one share.

Also,

Resolved, That the directors be requested to resume the payments of cash dividends.

Adjourned.

GEO. S. RICHARDSON, *Chairman*.

JOHN CARLISLE, *Sec'y*.

Office Gt. W. M. & M. Co.

CINCINNATI, *Jan.* 11, 1888.

Immediately after the meeting of the stockholders, adjourned, the directors were called together, the vice-president in the chair.

The report of the action of the stockholders at their meeting today was submitted, and on motion approved, and the officers of the company were directed to issue said stock.

It was also voted to commence paying regular quarterly dividends in cash of three-fourths of one per cent. on the capital stock, said dividends to be computed from the net earnings of the quarters ending on the first day of April, July, October and January of each year, and to be paid to the stockholders on or before the first days of the following months, until otherwise directed by a vote of the directors.

Adjourned.

GEO. S. RICHARDSON, *V.-P.*

JOHN CARLISLE, *Sec'y*.

(1.) Office of the Gt. W. M. & M. Co.

PEACH ORCHARD, KY., *Apr.* 26, 1888.

(2.) The annual meeting of the stockholders of the Great Western Mining and Manufacturing Company will be held at the office of the company in Peach Orchard, Ky., on Thursday, April 26, 1888,

at 12 m., for the purpose of electing seven directors and for the transaction of other business.

JOHN CARLISLE, *Sec'y.*

Ashland, Ky., M'ch 26, 1888.

(1.) In pursuance of the above notice, the stockholders of the Gt. W. M. & M. Co. met this day at 12 m.

Mr. G. D. Harris was chosen chairman, and John Carlisle, secretary.

The annual reports of the general manager and treasurer were read and ordered filed.

174 On motion, the meeting proceeded to elect seven directors, John Carlisle and G. S. Richardson were appointed tellers and judges. 2,488 votes out of 2,500 were polled.

Certificate of Election.

We hereby certify that B. D. Harris, G. D. Harris, L. Hinsdale, John Carlisle, G. W. Carlisle, Geo. S. Richardson and J. C. Holden, have received 2,488 votes, the total number cast, and they are hereby declared elected directors of the Great Western Mining and Manufacturing Company to serve for one year or until their successors are elected and qualified.

GEO. S. RICHARDSON, *Judge.*
JOHN CARLISLE, *Judge.*

Adjourned.
JOHN CARLISLE, *Sec'y.*

We the undersigned directors of the Great Western Mining and Manufacturing Co., elected to serve for the ensuing year or until our successors are elected and qualified, do each of us solemnly swear that we will severally, so far as the duty devolves on us, diligently and honestly administer the affairs of said Gt. Western Mining & Manufacturing Co., and that we will not knowingly violate or willingly permit to be violated, any of the provisions of the laws of Kentucky under which said Gt. Western Mining & Mauufacturing Co. has been organized, and that each of us is the *bona fide* owner in his own right, of the number of shares of stock subscribed for by him, or standing in his name on the book of said Gt. Western Mining & Manufacturing Company.

B. D. HARRIS.
G. D. HARRIS.
G. W. CARLISLE.
GEO. S. RICHARDSON.
JOHN CARLISLE.

Sworn to before — this the 26th day of April, 1888.
Witness my hand and seal, this day and year above written.
[L. S.] BEN W. SINGER,
Notary Public, Boyd County, Kentucky.

175 ASHLAND, *April* 26, 1888.

Office Gt. W. M. & M. Co.

The directors elected this day by the stockholders met at Ashland at 5 p. m. for organization.

Present: Messrs. B. D. Harris, G. D. Harris, G. S. Richardson, G. W. Carlisle and John Carlisle. Mr. Richardson was chosen chairman, and John Carlisle secretary.

The board at once proceeded to choose officers.

Mr. B. D. Harris was elected president.

Mr. Geo. S. Richardson was elected vice-president.

Mr. John Carlisle was elected secretary and treasurer.

The president and secretary were appointed a committee to prepare a plan for securing additional capital in order to increase the business of the company.

Adjourned.

GEO. S. RICHARDSON, *Chairman.*

JOHN CARLISLE, *Sec'y.*

CINCINNATI, *Jan.* 15, 1889.

Office Gt. W. M. & M. Co.

Special meeting of the board of directors Gt. W. M. & M. Co.

Present: G. S. Richardson, V.-P.; L. Hinsdale, G. W. Carlisle and John Carlisle.

Vice-president in the chair, who reported that the business of the company during the past year had been exceptionally good, the net earnings being about $30,600, out of a production of 70,000 tons lump coal. On motion of G. W. Carlisle, it was

Resolved, That hereafter, until further notice, a dividend of 1 per cent. for each three months, be paid on the capital stock outstanding.

It appearing that the item of construction acc. shows over $150,000 having been paid for improvements and betterments from the net earnings of the company, which amount properly belongs to the stockholders of this company, it was, upon motion of Mr. Hinsdale,

Resolved, That the attention of the stockholders, at the next annual meeting, be called to the fact of such appropriation of the net earnings, with a request that they instruct the board what action to take.

The secretary reported that the president and himself had conferred with Eastern capitalists on the subject of additional capital for this company, who recommended the issuing of first mort-

176 gage bonds, which would be sold at about 80c. on the dollar.

Report received and committee continued.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Stockholders' Meeting.

The annual meeting of the stockholders of Great Western Mining & Manufacturing Co. will be held at the office of the company, in Ashland, Ky., Monday, April 22d, 1889, at 12 o'clock m., for the purpose of electing seven directors, and for the transaction of other business.

JOHN CARLISLE, *Sec'y.*

Ashland, Mar. 26, 1889.

Office of Gt. W. M. & M. Co.

KY., *April* 22, 1889.

In pursuance of the above notice, the stockholders of the Gt. Western Mining & Manufacturing Co. met this day at 10 a. m.

Mr. G. S. Richardson was chosen chairman, and John Carlisle, secretary.

The entire number of 2,500 shares was represented, either in person or by proxy.

The annual reports of the general manager and treasurer were read and ordered filed.

On motion, the meeting proceeded to elect seven directors to serve the ensuing year, or until their successors are elected and qualified. B. D. Harris and Geo. W. Carlisle were appointed judges and tellers.

Certificate of Election.

We hereby certify that B. D. Harris, G. D. Harris, L. Hinsdale, Jas. C. Holden, G. W. Carlisle and John Carlisle and Geo. S. Richardson have received 2,500 votes, the total number of shares issued, and they are hereby declared elected directors of the Gt. Western Mining & Manufacturing Co.

B. D. HARRIS, *Judge.*
G. W. CARLISLE, *Judge.*

The attention of the stockholders being called to the large amount of net earnings being used for construction and betterments, the following resolution was presented, and after consideration, was adopted, to-wit:

177 Whereas, there have been expended for permanent improvements and betterments, including machinery, barges, flats, etc., during the year- 1884, 1885, 1886, 1887 and 1888, more than one hundred and sixty thousand dollars ($160,000.00), all of which sum has been furnished from the net earnings of the company, and fairly belongs to the stockholders of the company; therefore,

Resolved, That the directors of this company be, and hereby are, authorized and requested to direct the president and secretary of the company to issue one thousand shares of the capital stock of the company, to be divided *pro rata* among the present stockholders of this company as follows:

To B. D. Harris, 300 shares.
To G. D. Harris, 300 shares.
To John Carlisle, 220 shares.
To G. W. Carlisle, 150 shares.
To Geo. S. Richardson, 26 shares.
To Jas. C. Holden, 2 shares.
To Loring Hinsdale, 2 shares.

The matter of negotiating a loan for the benefit of the company was also presented for consideration, and after some discussion, the following preamble and resolution were adopted, to-wit:

Whereas, by the charter of the Great Western Mining and Manufacturing Company — is authorized to borrow money to issue bonds therefor, to be secured by a deed of trust or mortgage of the property of the company; and,

Whereas, it is now expedient and necessary to negotiate a loan for the purpose of more thoroughly developing and largely increasing the output of the mines at Peach Orchard, for the purpose of additional machinery and working plant, and for the liquidation of the present indebtedness of the company; therefore,

Resolved, By the stockholders of said Great Western Mining and Manufacturing Company, that the directors of said company be, and hereby are, authorized and requested to negotiate a loan of three hundred thousand dollars ($300,000), and to issue bonds therefor, and to execute a proper legal deed of trust or mortgage of all the property of the company, to secure said bonds and interest, and to be payable at such time and place as the directors may determine.

The meeting of the stockholders then adjourned.

JOHN CARLISLE, *Sec'y.*

178 ASHLAND, KENTUCKY, *April* 22, 1889.

A meeting of the newly elected directors of the Great Western Mining and Manufacturing Company was held this day, immediately after the adjournment of the stockholders' meeting.

There were present B. D. Harris, Geo. S. Richardson, G. W. Carlisle and John Carlisle; absent, G. D. Harris, J. C. Holden and Loring Hinsdale.

The directors present were duly sworn to faithfully discharge and perform the duties devolving upon them, according to law. B. D. Harris was elected president of the company; Geo. S. Richardson, vice-president, and John Carlisle, secretary and treasurer, to serve as such for the ensuing year.

The following preamble and resolutions were presented and after full consideration, were unanimously adopted, to-wit:

Whereas, the Great Western Mining and Manufacturing Company of Kentucky has power under its charter to borrow money, and to issue bonds therefor and secure payment of the same by the mortgage of all or any part of the property of the company;

And whereas, at a meeting of the stockholders of the said company, held on the 22d day of April, A. D. 1889, the directors were authorized and requested to negotiate a loan of three hundred thousand dollars ($300,000), and to issue bonds therefor and to execute a deed of trust or mortgage to secure payment thereof, on all the property of said company;

And whereas, it is desirable to more thoroughly develop and to largely increase the output of the mines at Peach Orchard, and such development cannot be secured without additional capital for the opening of new mines, for the purchase of additional machinery and working plant, and for the increase of terminal facilities; therefore,

Resolved, That this company will issue three hundred (300) mortgage bonds of the denomination of one thousand dollars ($1,000) each, to mature in twenty (20) years from June 1st, 1889, and to bear interest at the rate of 6 per cent. per annum, payable semi-annually, at the office of the Mercantile Trust and Deposit Company of Baltimore, Baltimore, Maryland, on the first days of June and December, in each year, the said interest to be represented by
179 coupons or interest warrants, principal and interest to be payable in United States gold coin of present standard weight and fineness.

(2.) *Resolved*, That the payment of the three hundred bonds aforesaid, as they respectively mature, and of the interest as it semi-annually becomes due and payable, shall be secured by a first mortgage or deed of trust, conveying to the Mercantile Trust and Deposit Company, of Baltimore, Baltimore, Maryland, all the property, real, personal and mixed of the Great Western Mining and Manufacturing Company, now owned and held, or that may hereafter be owned and acquired by said company, together with all its income and revenues and franchises, in trust, for the owners and holders of the said bonds, and to secure the full and faithful performance of all and every one of the obligations embodied in said deed of trust.

(3.) *Resolved*, That said deed of trust shall provide for the creation of a sinking fund in 1894; and the appropriation to such sinking fund shall be in each year thereafter, not less than ten thousand dollars ($10,000), and when the output shall exceed 300,000 tons of lump coal annually, an additional amount of one thousand dollars ($1,000), for each 25,000 tons excess, which sinking fund shall be used in the purchase of said bonds, which shall at once be cancelled by said trustee, and delivered to said Great Western Mining and Manufacturing Company; provided, however, if said bonds should not be obtainable at not exceeding their par value, the said trustee may designate by lot which bonds shall be retired.

(4.) *Resolved*, That the said deed of trust shall provide especially against the creation of any further mortgage debt, during the life of

the three hundred (300) first mortgage bonds aforesaid, except with the consent in writing thereto of at least two-thirds of the holders in value of the said first mortgage bonds.

(5.) *Resolved*, That the preparation of a bond and deed of trust, in conformity with the foregoing resolutions, shall be entrusted to John Carlisle, and that the same, when duly approved by B. D. Harris, president, shall be executed in proper form by the said B. D. Harris, as president, and the corporate seal of the company, duly attested by John Carlisle, the secretary thereof, attached thereto.

(6.) *Resolved*, That the president and secretary of the company shall arrange for the sale of the three hundred (300) bonds aforesaid, in their discretion at the best price obtainable; and the pro-
180 ceeds thereof shall be applied to the cancellation and retirement of sixty (60) first mortgage seven per cent. bonds, dated January 1st, 1884, now outstanding; also, to the payment of all floating indebtedness incurred up to date hereof, for material and construction; and the balance shall be used by the directors for the best interest of the company.

The following preamble and resolution were also presented and adopted, to-wit:

Whereas, at the annual meeting of the stockholders of this company, a resolution was adopted, requesting the directors to issue additional capital stock of this company, to the amount of one thousand shares, to be divided *pro rata* among the present stockholders; and based upon the fact that during the last five years more than one hundred and sixty thousand dollars ($160,000) of the net earnings of the company have been expended for permanent improvements and betterments, thereby adding that amount to the assets of the company, which belong to the stockholders of the company; therefore,

Resolved, That the president and secretary of this company are hereby directed to issue one thousand shares of the capital stock of the company, to the present stockholders, in proportion to the amount of stock already owned by them, respectively, and that they furnish certificates of such stock, as follows:

To B. D. Harris, 300 shares.
To G. D. Harris, 300 shares.
To John Carlisle, 220 shares.
To G. W. Carlisle, 150 shares.
To Geo. S. Richardson, 26 shares.
To Jas. C. Holden, 2 shares.
To Loring Hinsdale, 2 shares.

The president was directed to execute a deed in behalf of the company, conveying the schoolhouse, built by the company, to the proper officers of the school district, in which said schoolhouse is situated.

Messrs. Richardson and John Carlisle were appointed a committee to adjust salaries of officers and employés of the company.

The board then adjourned.

JOHN CARLISLE, *Sec'y.*

181 CINCINNATI, OHIO, *May* 13, 1889.

A meeting of the directors was held this day in Cincinnati, Ohio, at the office of John Carlisle, at 11 o'clock a. m.

There were present Messrs. Richardson, Hinsdale, G. W. Carlisle and John Carlisle; absent, Messrs. B. D. Harris, G. D. Harris and Holden.

In the absence of the president, Vice-President Richardson occupied the chair. The minutes of the last meeting of directors, held April 22d, 1889, were read and approved.

John Carlisle reported that in compliance with the action of the board at the last meeting, he had employed counsel to prepare bonds and deed of trust, which had been submitted to the president and approved by him. He also presented a written communication from the stockholders of the company, which was read, and is as follows:

Proposition of Stockholders of the Great Western Mining & Manufacturing Company to the Directors of said Company.

Whereas, the directors of the Great Western Mining and Manufacturing Company have taken steps to borrow the sum of $300,000, to be used in payment of existing indebtedness of the company, and to provide additional working capital, etc., and have authorized the president and secretary to execute bonds for said amount, and to negotiate the same at the best price obtainable; and

Whereas, we are informed that it will probably be possible to find purchasers for said bonds at the price of 85 per cent. of the par value thereof, provided that stock of the company, to the extent of 50 per cent. of the par value of the said bonds, shall also be transferred to the several purchasers of said bonds; and

Whereas, it is deemed to *him* expedient to issue any new stock of the company for such purpose, and desiring to do all we can to assist the directors in procuring said loan and the sale of said bonds;

We therefore make this proposition to the directors of the company in reference to the sale of stock held by us in said company to the purchasers of the said bonds, to-wit:

We will sell to the several purchasers of said bonds of the company, stock of the company belonging to us, in the amount set opposite to our names, respectively, and will furnish to the secretary of the company certificate of said stock assigned in blank, to be by him delivered to said purchaser of said bonds, upon the understanding and agreement, that we are to receive the sum of $50 for
182 each share of stock so sold by us, out of the money paid for said bonds, and said secretary shall act as our agent in receiving said amounts, and shall pay us the same before the company shall be entitled to have the remainder of the money paid for said bonds by the purchasers thereof.

This action is not to be construed as a proposition to sell said stock to the company, but is to be treated and regarded as a sale of stock

directly to the purchasers of said bonds, to be paid for by them to us, and the payment by them to the secretary of this company for said bonds shall be regarded as a payment to us for said stock, to the extent necessary to pay us therefor upon the terms above stated.

In testimony whereof, we have hereunto set our hands, on this third day of May, 1889.

B. D. HARRIS,	450 shares.
G. D. HARRIS,	450 shares.
JOHN CARLISLE,	336 shares.
GEO. S. RICHARDSON,	39 shares.
G. W. CARLISLE,	225 shares.
Total.....	1,500 shares.

After full consideration of the proposition, the same was accepted, and the secretary was authorized to act as the agent for said stockholders, in the proposed sale of their stock and the collection of the purchase money therefor, and directed to turn over the net proceeds of the sale of bonds into the treasury of the company.

The board then adjourned.

JOHN CARLISLE, *Sec'y*

Stockholders' Meeting.

The annual meeting of the stockholders of the Great Western Mining and Manufacturing Company will be held at the office of the company, in Ashland, Ky., Thursday, April 24, 1890, at 12 o'clock m., for the purpose of electing seven directors and for the transaction of other business.

JOHN CARLISLE, *Sec'y.*

Ashland, March 19, 1890.

ASHLAND, KY., *April* 24, 1890.

In pursuance of the above notice, the stockholders of the Great Western Mining and Manufacturing Company, met this day at 12 m.

183 Mr. G. S. Richardson was chosen chairman, and John Carlisle, secretary.

Two thousand six hundred and thirty-eight shares of stock were present in person and by proxy.

The annual reports of the treasurer and general manager were read and ordered filed.

On motion, the meeting proceeded to elect 7 directors for the ensuing year, or until their successors are elected. G. D. Harris and G. W. Carlisle were appointed judges and tellers.

Certificate of Election.

We hereby certify that B. D. Harris, G. D. Harris, H. P. Scott, Geo. S. Richardson, G. W. Carlisle, Loring Hinsdale and John Carlisle have each rec'd 2,638 votes, out of 3,500, and they are hereby declared elected directors of the Great Western Mining and Manufacturing Co.

G. D. HARRIS, *Judge.*
G. W. CARLISLE, *Judge.*

There being no further business, the stockholders' meeting adjourned.

JOHN CARLISLE, *Sec'y.*

(B. 1.)

Office Gt. W. M. & M. Co.

ASHLAND, KY., *April* 24, 1890.

A meeting of the newly elected directors of the Gt. Western Mining and Manufacturing Co. was held this day immediately after the adjournment of the stockholders' meeting.

There were present Messrs. B. D. Harris, G. D. Harris, Geo. S. Richardson, G. W. Carlisle and John Carlisle, who duly took the oath of office.

Mr. G. S. Richardson was chosen chairman, and Mr. John Carlisle, secretary. The minutes of the meetings of the previous board were read and approved.

Balloting then took place for officers, when the following were unanimously elected:

B. D. Harris, president; Geo. S. Richardson, vice-president, and John Carlisle, secretary and treasurer.

Mr. Richardson offered the following, which was unanimously adopted:

Resolved, That the secretary be authorized to furnish the data to the Baltimore stock exchange, required by said exchange, to list on the board the securities of this company.

184 The subject of yard facilities in Cincinnati having been discussed, on motion, the secretary was authorized to negotiate and purchase for the benefit of this company, at the lowest possible price, the entire stock and assets of the Elevated Railway and Coal Company, in Cincinnati, at a price not to exceed $12,000, and when purchased to make the necessary improvements at a cost not to exceed $3,000.

The subject of compensation for Mr. John Carlisle, who for several years has served this company as secretary and treasurer and business manager, was discussed, and on motion of Mr. G. D. Harris, the following resolution was unanimously adopted:

Resolved, That hereafter, beginning with January 1st, 1890, and until further notice, Mr. John Carlisle be allowed for his services, a commission of five cents per ton on all coal mined and sold by this company.

On motion, adjourned.

JOHN CARLISLE, *Sec'y.*

Office Gt. W. M. & M. Co., 37 Carlisle building.

CINCINNATI, *June* 12, 1890.

Called meeting of the board of directors.

Present: Messrs. Richardson, Hinsdale, G. W. Carlisle and John Carlisle. Vice-president in the chair.

Minutes of previous meeting read and approved. On motion of G. W. Carlisle, it was

Resolved, That a quarterly dividend of one dollar per share be paid on July 15, 1890, to all stockholders of record, and on the 15th day of each quarter until further ordered.

Upon recommendation of the superintendent, the board decided to use mining machine, and on motion of Mr. John Carlisle, the superintendent was authorized to set up the plant at the new mine and to employ an expert to teach our men the use of machine.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

PEACH ORCHARD, KY., *Apr.* 22, 1891.

Meeting of the board of directors, held this day at 7 p. m. at the office of the company at Peach Orchard.

Present: Messrs. G. D. Harris, Richardson, G. W. Carlisle and John Carlisle.

185 The vice-president in the chair. Minutes read and approved.

The annual reports of the superintendent and treasurer were read and approved, and on motion of Mr. G. W. Carlisle, were ordered to be submitted to the stockholders at the annual meeting to be held tomorrow, 23d inst., at Ashland, Ky.

There being no further business, the board adjourned.

JOHN CARLISLE, *Sec'y.*

Stockholders' Meeting.

The annual meeting of the stockholders of the Great Western Mining and Manufacturing Company will be held at the office of the company, in Ashland, on Thursday, April 23d, 1891, at 12 m.

JOHN CARLISLE, *Sec'y.*

Office Gt. W. M. & M. Co.

ASHLAND, KY., *April* 23, 1891.

In pursuance of the above notice, the stockholders of the Great Western Mining and Manufacturing Company met this day at 9 a. m.

Mr. G. W. Carlisle was chosen chairman, and Mr. Geo. S. Richardson, secretary.

Shares of stock were represented by proxy or in person.

The annual reports of the treasurer and superintendent were read and ordered filed. On motion of Mr. John Carlisle, the meeting proceeded to elect 7 directors for the ensuing year, or until their successors are elected and qualified.

G. D. Harris and John Carlisle were appointed judges and tellers.

Certificate of Election.

We hereby certify that B. D. Harris, of Brattleboro, Vt.; G. D. Harris, of Keene, N. H.; H. P. Scott, of Wilmington, Del.; G. W. Carlisle, Loring Hinsdale and John Carlisle, of Cincinnati, and Geo. S. Richardson, of Ashland, Ky., have each received votes out of 3,500 shares, and they are hereby declared directors of the Great Western Mining and Manufacturing Company of Kentucky.

JOHN CARLISLE,
G. D. HARRIS, *Judges.*
GEO. S. RICHARDSON.

186 It being represented to the stockholders that the present entries in the mines if continued in the same direction would within a short period encroach on the property adjoining on the south, and in order to avoid future litigation, it would be advisable to purchase or lease this adjoining property.

It was moved and seconded that the board of directors be requested to see upon what terms said property could be obtained, and if it could be leased, that they be empowered to lease it for such period as they may deem best, on a royalty not exceeding ten cents per ton.

The subject of terminal facilities in Cincinnati was discussed, it being reported to this meeting that the Elevated Railway & Coal Co. could not be secured at the price offered by this company. On motion, the board of directors were authorized and empowered, all or a majority of the stock of the Carlisle Coal Company in Cincinnati, and for that purpose they be empowered to borrow a sum not exceeding $50,000 for such time, and upon such rate of interest as they may deem best.

GEO. S. RICHARDSON, *Sec'y.*

Office of Gt. W. M. & M. Co.

ASHLAND, KY., *Apr.* 23, 1891.

A meeting of the newly elected board of directors of the Great Western Mining and Manufacturing Company was held this day immediately after the adjournment of the stockholders' meeting.

Present: Messrs. G. D. Harris, Geo. S. Richardson, G. W. Carlisle and John Carlisle.

The directors were sworn to faithfully discharge and perform the duties devolving upon them according to law.

Mr. G. D. Harris was called to the chair, and John Carlisle chosen secretary.

Balloting for officers proceeded, when it appeared that

B. D. Harris was elected president.

Geo. S. Richardson was elected vice-president.

John Carlisle was elected secretary and treasurer by a unanimous vote.

The resolution of the stockholders was taken up, and the board resolved to appoint a committee, consisting of the vice-president and secretary, to obtain, if possible, a lease of the property adjoining the property of this company on the south, on such terms and
187 conditions as may be favorable to this company, not exceeding ten cents per ton royalty on lump coal.

The recommendation of the stockholders to the board to obtain terminal facilities in Cincinnati was then discussed, and it being reported that capital stock of the Carlisle Coal Co. can be obtained at par, *i. e.*, $30,000 to present stockholders and $20,000 to make necessary improvements and for working capital. On motion of G. W. Carlisle, it was

Resolved, That the treasurer be authorized to negotiate a loan not exceeding $50,000 for the purpose of obtaining proper facilities for elevating, storing and disposing of our coal in Cincinnati, either by purchasing a majority or all the stock of the Carlisle Coal Co., and to report at the next meeting of the board.

Adjourned.

JOHN CARLISLE, *Sec'y.*

CINCINNATI, *July* 15, 1891.

Office Gt. W. M. & M. Co.

Regular meeting of the board of directors of the company, called by the vice-president.

Present: Richardson, Hinsdale, John Carlisle and G. W. Carlisle.

The vice-president in the chair,

Minutes of previous meetings read and approved.

The vice-president of the company stated he had received a communication from the office of the Ohio & Big Sandy R. R. Co.,

requesting this company to grant to said Ohio & Big Sandy R. R. Company a right of way one hundred feet wide for their new line on the front, or river side, of the property, for a distance of about one mile.

On motion, the matter was referred to a committee, consisting of the president and general manager, to arrange for the best interest of this company, and report at a future meeting.

The general manager reported that it was necessary, owing to the long haul that a change in the system should be made by adopting the "tail rope," which could be operated by machinery. The cost would be less than $5,000. It would release from service ten mules, valued at $1,000, and would save the cost of feeding and attendance, besides largely increasing the facilities for hauling and loading. On motion, the recommendation was approved, and he was directed to make the changes.

JOHN CARLISLE, *Sec'y.*

188 CINCINNATI, *Oct.* 22, 1891.

Office of Gt. W. M. & M. Co.

Meeting of the board of directors of this company, called by the vice-president, was held this day.

Present: Messrs. Richardson, Hinsdale, G. W. Carlisle and John Carlisle.

Minutes of previous meeting read and approved. Vice-president in the chair.

The report of the committee on right of way to the Ohio & Big Sandy R. R. recommended the granting of the same on condition that said railway company removed such houses as were on the line to such points as this company may direct on the company's property.

On motion, the recommendation of the committee was approved, by this board, subject to a further approval by the stockholders at such meeting as may be called for the purpose, or at the annual meeting of the company next April.

The committee on leasing property was granted further time as they were not ready to report.

The committee on terminal facilities weer also granted further time, not being ready to report.

The general manager made a verbal report on the manufacture of brick out of the fire clay and shale, or the wastage from the mines.

On motion the general manager was requested to obtain all necessary information, as to capital required, cost of making, and probable profits, and also have test made of the material for that purpose, and to report same at the annual meeting.

Adjourned.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

CINCINNATI, *Apr.* 27, 1892.

Called meeting of the board of directors of this company.

Present: Messrs. Richardson, Hinsdale, G. W. Carlisle and John Carlisle.

Vice-president in the chair.

Minutes of previous meeting read and approved.

No reports from committee ready.

The annual reports of the secretary on behalf of the board, and of the general manager and the treasurer were read and adopted.

189 On motion the annual reports were referred to the stockholders at their meeting to be held in Ashland, Ky., on to-morrow, April 28, 1892.

On motion adjourned.

JOHN CARLISLE, *Sec'y.*

Stockholders' Meeting.

The annual meeting of the stockholders of the Great Western Mining and Manufacturing Company of Kentucky, will be held at the office of the company in Ashland, Ky., on Thursday, April 28, 1892, for the purpose of electing seven directors and for the transaction of other business.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

ASHLAND, KY., *Apr.* 28, 1892.

In pursuance of the above notice the stockholders of the Great Western Mining and Manufacturing Company met this day.

Mr. G. W. Carlisle was chosen chairman and Mr. G. S. Richardson, secretary.

There was represented in person and by proxy 1,900 shares of stock.

The annual reports of the directors, the treasurer and general manager were read and on motion were ordered filed, and the directors were requested to have them printed and a copy sent to each stockholder.

The recommendation of the general manager in reference to utilizing the waste from the mines was thoroughly discussed, and the following resolution unanimously adopted.

Resolved, That the directors of this company carefully examine and have tested the material now being wasted at the mines, to its adaptability for making first-class brick, and if in their judgment it is deemed advisable to establish a plant for the manufacture of

brick, that they be authorized and empowered to borrow on such terms and conditions as they think best a sum not exceeding thirty thousand dollars ($30,000) to be used for that purpose.

The attention of the stockholders was called to the recommendation of the board of directors favoring the granting of a right of way to the Ohio and Big Sandy Railroad Co., for their new line along that portion of their property fronting on the Big Sandy river about 100 feet wide. It being demonstrated to the stock-
190 holders that the building of the road on such line would benefit the property, it was

Resolved, That the directors through their officers be authorized to make to said Ohio & Big Sandy R. R. Co., a deed, subject to the trust deed heretofore given the Mercantile Trust and Deposit Co., of Baltimore, to secure the payment of $300,000 of the bonds of this company, for the right of way along that portion of the property fronting on the Big Sandy river.

On motion, an election for directors to serve the ensuing year or until their successors were elected was ordered.

G. S. Richardson and John Carlisle were appointed judges and tellers.

Certificate of Election.

We hereby certify that B. D. Harris, G. D. Harris, H. P. Scott, L. Hinsdale, Geo. S. Richardson, G. W. Carlisle and John Carlisle have received each 1,900 votes, the total number of shares represented at the meeting and being a majority of the total issue of shares of stock, they are hereby declared directors of the Great Western Mining and Manufacturing Company to serve for one year or until their successors are elected and qualified.

JOHN CARLISLE,
—— ——, *Judges.*

Office of Gt. W. M. & M. Co.,

CINCINNATI, *May* 3, 1892.

Regular — of the new board called this day by Messrs. Richardson and John Carlisle for organization.

Present: G. S. Richardson, L. Hinsdale, G. W. Carlisle and John Carlisle.

G. S. Richardson was called to the chair and John Carlisle appointed secretary.

Minutes of the last meeting of the old board read and approved.

The election of officers being in order, on motion

Mr. B. D. Harris was unanimously elected president.

Mr. G. S. Richardson was unanimously elected vice-president.

Mr. John Carlisle was unanimously elected secretary and treasurer.

In accordance with the resolution of the stockholders passed at the annual meeting, April 28th, the following resolution was unanimously adopted:

191 Whereas, the Ohio and Big Sandy Railroad Co., has put down its track over the lands of this company along the east side of the Louisa fork of the Big Sandy river, in accordance with permission granted by parol, and now desires to have a conveyance of the right of way, 100 feet in width, along both sides of the center line of said railroad track, and has prepared and presented to this company a deed for such right of way, to be executed by this company; therefore

It is ordered by the board of directors that the vice-president, Geo. S. Richardson, in behalf of the company, execute and deliver to said Big Sandy Railroad Co., a quit claim deed for said right of way, as described in the said deed prepared in behalf of said company; but said deed shall reserve the right on the behalf of this company, to cross said railroad, and right of way, by a road one or more points, at grade of said railroad, or otherwise.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

CINCINNATI *June* 1, 1892.

Meeting of the directors held this day as per call of the president.

Present: Messrs. Richardson, G. D. Harris, G. W. Carlisle and John Carlisle.

Minutes of previous meetings read and approved.

The general manager being present made a report on the progress of the work in the Elizabeth mine, which on motion of Mr. Harris was approved. The matter of employing colored miners was referred to the vice-president and general manager with power to act.

A proposition was received from the Diamond Drill Prospecting Co., to bore a hole not to exceed 1,000 feet in depth and take out a core of 1⅞ in. diameter, for $2.50 per foot; referred to general manager to see if any property owners would share the expense.

On motion of G. D. Harris the general manager was authorized to renew the same plan of insurance with the American Casualty Co., for another year.

The resignation of Mr. Hinsdale as director was accepted and on motion of G. W. Carlisle, Mr. W. A. Goodman was chosen in his place.

JOHN CARLISLE, *Sec'y.*

192 Office of Gt. W. M. & M. Co.

CINCINNATI, *Sept.* 21, 1892.

Called meeting of the directors of the Great Western Mining and Manufacturing Company.

Present: Messrs. Richardson, G. D. Harris, G. W. Carlisle and John Carlisle.

Vice-president in the chair.

Mr. Carlisle reported that his failure had compelled an application to the U. S. court for the appointment of a receiver of the company by reason of his name being endorsed on the company's notes for coal purchased, and the holders of said notes bringing suits and attachments against the company, the application was made in order to save the property and prevent its being sacrificed.

The court appointed Mr. L. C. Black, receiver on Sept. 13th.

Upon resolution of Mr. Harris the action of Mr. Carlisle was unanimously approved.

JOHN CARLISLE, *Sec'y.*

Office of Gt. W. M. & M. Co.

CINCINNATI, *Jan.* 19, 1893.

Called meeting of the board.

Present: Messrs. Richardson, Goodman, G. W. Carlisle and John Carlisle.

The secretary reported that B. D. Harris and G. D. Harris had sold out their entire holdings of stock in this company and were no longer directors.

On motion the positions of the Messrs. Harris as directors were declared vacant.

The board proceeded to elect two directors in place of B. D. Harris and G. D. Harris.

Messrs. Jas. M. Glenn and Rob't Simpson were unanimously chosen to fill the vacancies and are hereby declared elected directors.

JOHN CARLISLE, *Sec'y.*

COVINGTON, KY., *Apr.* 27, 1893,

In pursuance of the above notice the stockholders of the Great Western Mining and Manufacturing Company, of Kentucky, met this day.

There was represented in person and by proxy 2,020 shares of stock out of 3,500 shares.

Mr. Robert Simpson was chosen chairman and W. I. Corey, secretary.

193 On motion of Mr. Woodward, seconded by Mr. Corey, an election for seven directors to serve the ensuing year or until their successors are elected was ordered.

S. Woodward and W. I. Corey were appointed judges and tellers.

Certificate of Election.

We hereby certify that Jas. M. Glenn, Robert Simpson, Geo. S. Richardson, E. W. Stoddard, Sam'l Woodward, Wm. Black and W. I. Corey, have each received 2,020 votes, being a majority of all the stock and they are hereby declared elected directors of the Great Western Mining and Manufacturing Company to serve for one year or until their successors are elected and qualified.

S. WOODWARD,
W. I. COREY, *Judges.*

There being no further business the stockholders' meeting adjourned.

W. I. COREY, *Sec'y.*

COVINGTON, KY., *Apr.* 27, 1893.

A meeting of the newly elected board of directors of the Great Western Mining and Manufacturing Co., was held this day immediately after the adjournment of the stockholders' meeting.

Present: Messrs. Glenn, Simpson, Woodward, Black and Corey.

The directors were sworn to faithfully discharge and perform the duties devolving upon them according to law.

Mr. Jas. M. Glenn was called to the chair and W. I. Corey chosen secretary.

Balloting for officers proceeded.

James M. Glenn was unanimously elected president.

Geo. S. Richardson was unanimously elected vice-president.

W. I. Corey was unanimously elected secretary and treasurer.

Adjourned.

W. I. COREY, *Pres't.*

CINCINNATI, *May* 23, 1893.

A called meeting of the directors of the Great Western Mining and Manufacturing Co., was held this morning at 37 Carlisle building.

194 Present: Messrs. Glenn, Simpson, Woodward, Black and Corey.

Minutes of previous meeting read and approved.

The subject brought before the meeting was: What course to be taken in resisting the action of the bondholders for foreclosure.

After discussion the following resolution was offered by Mr. Simpson, seconded by Mr. Woodward.

Resolved, That the secretary of this company be and is hereby instructed to request Mr. Black, the receiver of this company, to fur-

nish to this board a statement of the receipts, expenditures and net earnings of this company since his appointment as receiver thereof.

On motion adjourned to meet May 27th, at 9 a. m.

W. I. COREY, *Sec'y.*

CINCINNATI, *May* 27, 1893.

Meeting of the directors of the Great Western Mining and Manufacturing Co., from May 23rd.

Present: Messrs. Glenn, Simpson, Woodward and Corey.

Minutes read and approved.

Verbal communication of reply of Mr. Black, receiver, of request for statement of receipts and expenditures was presented by the secretary to the effect that Mr. Black did not feel authorized, as an officer of the court, to make a statement except through court.

On motion a committee was appointed consisting of the president and Mr. Woodward to consult with Rankin D. Jones as to what course to pursue in resisting foreclosure.

On motion adjourned to meet at call of president.

W. I. COREY, *Sec'y.*

195 EXHIBIT "107" A.

United States Circuit Court, District of Kentucky, May Term.

SATURDAY, *October* 1*st*, *A. D.* 1892.

Court met.

Present: Hon. Wm. H. Taft, circuit judge.

SAMUEL WOODWARD, Assignee, &c., }
vs.
THE GREAT WESTERN MINING & MFG. CO. }

The above cause coming on this day to be heard upon the motion of complainant for the appointment of a receiver and having — fully heard and considered, it is ordered by the court that said motion be granted, and that the order hereinbefore entered, appointing L. C. Black as temporary receiver, be continued, and said L. C. Black be and he is hereby appointed receiver of all the property, rights in action, choses in action, and all assets of every description, of the defendant, The Great Western Mining and Manufacturing Co., with all the powers and authority conferred by the order appointing him temporary receiver herein; and that he is to act and continue to act under the orders hereinbefore made and that he hold and keep the property and assets arising from the funds of said business, or that may come into his hands, subject to such order as may be made from time to time; and it is also ordered that he shall have power to purchase such current supplies as are, or may be needed, in the proper conduct and operation of the business of said company.

UNITED STATES OF AMERICA, *District of Kentucky*, } ss:

I, Jos. C. Finnell, clerk of the United States circuit court, for the sixth judicial circuit and district of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of an order made and entered in the matter set out in the caption hereto, as the same appears from the records and files of this office.

196 Witness my hand as clerk and the seal of said court, at Covington, this 19th day of April, A. D. 1901.

[L. S.]

JOS. C. FINNELL, *Clerk*,
By I. B. SELLERS, *D. C.*

EXHIBIT "108."

United States Circuit Court, District of Kentucky.

SAMUEL WOODWARD, Assignee of John Carlisle,
vs.
THE GREAT WESTERN MINING & MANUFACTURING COMPANY ET AL.

To the Honorable William H. Taft, judge of the circuit court of the United States in and for the sixth circuit:

The receiver represents that he has ascertained from the books and records of the Great Western Mining & Manufacturing Company, in his possession, that, in connection with the floating of the loan of $300,000 in the year 1889, upon the property of the Great Western Mining and Manufacturing Company, situate in Lawrence county, Kentucky, certain stockholders and officers of said company combined to obtain for themselves, and did so obtain, proceeds resulting from the sale of said bonds in the sum of $75,000, which money belonged to and should have been paid into the treasury of said company.

Your receiver says that he finds shares of capital stock of the Great Western Mining & Manufacturing Company were issued at the instance of, and through the action of certain of said stockholders and officers of said company, to the amount of $150,000, which said stock was distributed among said stockholders and officers; that as your receiver is informed and believes there was no consideration for the issue and distribution of said stock; that the said stock was sold by said stockholders, so as aforesaid receiving it, to the defendant, The Great Western Mining & Manufacturing Company, and by means of said sale moneys to the amount of

197 $75,000 were abstracted from the treasury of said company; that the issue and distribution of said capital stock was, as your receiver believes, a mere device or instrumentality to abstract

said moneys from the treasury of said company; that said company as your receiver believes, has a valid claim against said persons to recover said moneys; that some of said parties are solvent and able to repay said monies and proceedings should be taken to recover it for said company and its creditors.

Your receiver further says that he has discovered from the books of the company that apparently by reason of the inattention and negligence of the board of directors of the said Great Western Mining and Manufacturing Company, and apparently by reason of the mismanagement and misappropriation of the funds of the company, by certain members of said board, that the said company has been greatly damaged and its assets depreciated in value in a large amount, the exact sum of which is unknown to your receiver, and that said losses should now be made part of the said company's assets and that the same is in the opinion of your receiver a valid claim against the said board of directors and that proceedings should be taken to recover the same for the said company and its creditors.

Wherefore, your receiver prays the direction of your honorable court as to his duty in the premises.

L. C. BLACK, *Receiver.*

UNITED STATES OF AMERICA, *District of Kentucky*, } *ss:*

I, Jos. C. Finnell, clerk of the circuit court of the United States, for the sixth judicial circuit and district of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of an application made in the case set out in the caption hereto, as the same appears from the original now on file in this office.

Witness my hand as clerk and the seal of said court, at Covington, this 31st day of March, A. D. 1900.

Ten cent inter. rev. stamp.

[L. S.] JOS. C. FINNELL, *Clerk.*

198 EXHIBIT "109."

United States Circuit Court, District of Kentucky, December Term,

TUESDAY, *January* 22, *A. D.* 1895.

Court met.

Present: Hon. Wm. H. Taft, circuit judge.

SAMUEL WOODWARD, Assignee of John Carlisle, Complainant,
vs.
THE GREAT WESTERN MINING AND MANUFACTURING Company *et al.*, Defendants. } No. 1799.

This cause coming on to be heard upon the application of L. C. Black, receiver herein, asking for instructions as to his duty in the

matters and things set forth in the said application, and wherein said receiver represents to the court that in certain transactions connected with the floating of a loan of $300,000 upon the property of the Great Western Mining and Manufacturing Company, apparently $75,000 was withdrawn by certain stockholders and officers of the said company whereas the same should have been paid into the treasury of the said company; and wherein said receiver further represents that apparently certain stock was issued to the stockholders and officers of the said company without consideration and that apparently by reason of the inattention and negligence and mismanagement of the board of directors of the said company and the misappropriation of the funds of the said company, said company has been greatly damaged and its assets depreciated.

And it appearing to the court that it will be for the advantage of the said company that suit shall be instituted against the stockholders and directors of the same for the recovery of the sums so represented to be lost, it is therefore directed that said receiver proceed in his own name as receiver or in the name of the company as he may be advised to recover said sums.

199 UNITED STATES OF AMERICA, } ss:
District of Kentucky, }

I, Jos. C. Finnell, clerk of the circuit court of the United States, for the sixth judicial circuit and district of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of an entry made in the case set out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said court, at Covington this 31st day of March, A. D. 1900.

Ten cent inter. rev. stamp.

[L. S.] JOS. C. FINNELL, *Clerk.*

EXHIBIT "110."

United States Circuit Court in and for the District of Kentucky.

SAMUEL WOODWARD, Assignee John Carlisle, }
vs. } No. 1799.
GREAT WESTERN MINING & MFG. CO. ET AL. }

Now comes the receiver and reports that he made the advertisement requiring creditors to file claims against the Great Western Mining & Mfg. Co. as directed by order of the court, that there has been presented to him claims, as shown by the annexed schedules.

Schedule "A" contains a list of general creditors with a brief statement of the character of the claim and its amount.

No attempt has been made to ascertain the origin of the things

embraced in Schedule "A," or the validity of said notes and drafts as claims against said company.

Schedule "B" hereto attached, consists of three claims which are presented as claims which ought to be paid by the receiver.

In reference to the claim of Huff, Andrews & Thomas, the receiver says that while the invoice of merchandise covered by their claim was dated September 10, 1892, three days prior to the
200 appointment of the receiver herein, the receiver finds that said goods were not received at the company's store at Peach Orchard, until after his appointment as receiver, but that said goods were made a part of the stock of the company's store and were appropriated by the receiver. The evidence showing these facts has been presented to the receiver.

The claim of M. C. Kirk is for labor performed in the service of the company as storekeeper prior to the appointment of the receiver. The amount claimed is for a balance due for wages within six months of the time of the appointment of the receiver.

Mr. Kirk claims that this claim should be paid as an equitable preference out of the proceeds of the property sold in this action.

The claim of the King Powder Co. is founded upon a purchase of powder made by the Great Western Mining & Mfg. Co. It appears that in October, 1891, the Great Western Mining & Mfg. Co. contracted with the King Powder Co. to purchase 800 kegs or 2 carloads of powder. One carload to be shipped at once, the second carload to be shipped upon notice from the mining Co. The first carload was shipped as directed and paid for, except a balance of $96, which stands as a general claim against the company. By mistake the second carload was shipped immediately after the shipping of the first carload. The mining Co. objected to receiving the second carload, for the reason that the company had not capacity to store so large an amount of powder. The King Powder Co. thereupon wrote to the mining Co., saying, "If you can store this powder we would be glad to have you do so and you need not pay for it until you have used it." In consequence of this, the mining Co. received the powder and stored it.

At the time the receiver was appointed, there were 225 kegs of powder on hand unused and it will appear from the affidavit of Oliver Brown that the powder on hand at that time was the residue of the first carload and that the second carload was wholly consumed.

The King Powder Co. claims that the receiver should account for and pay in full for the second carload of powder on the ground that it was on hand at the time he was appointed receiver and was by him converted to the use of the receiver and should be paid for. The evidence upon this claim accompanies the schedule.

201 The receiver asks the directions of the court concerning the claims covered by Schedule "B."

L. C. BLACK, *Receiver.*

SCHEDULE "A."

List of Claims against the Great Western Mining and Mfg. Co.

1.	Ashland national bank, Ashland, Kentucky, judgment on bill of exchange		$846.70
2.	Ashland Dry Dock Co., Ashland, Ky., repairs of barges		223.13
3.	Ashland foundry & mchc. wks., Ashland, Ky., bill for mdse		22.81
4.	American Book Company, Cincinnati, Ohio, bill for mdse		51.32
5.	Argand Refining Company, Marietta, Ohio, bill for mdse		9.81
6.	J. C. Ayer & Co., Lowell, Mass., bill for mdse		4.00
7.	Ashland Coal & Iron Co., Ashland, Ky., bill for mdse		29.54
8.	S. W. Bard, Cincinnati, Ohio, note G. W. M. & M. Co., endorsed by J. Carlisle		803.54
9.	Ball-Warfield Drug Co., Ironton, Ohio, bill for mdse		15.20
10.	R. R. Barton & Co., Catlettsburg, Ky., bill for mdse		102.14
11.	F. I. Billings & Co., Cincinnati, Ohio, bill for mdse		150.80
12.	Big Sandy Pottery Company, Catlettsburg, Ky., bill for mdse		5.35
13.	Woodward, assignee of John Carlisle, Cincinnati, Ohio, bal. acct., per statement attached		26,469.75
202			
14.	Cincinnati Volksblatt Co., Cincinnati, Ohio, loans with collateral note, J. & G. Carlisle, 200 shares G. W. M. & M. stock, order on C. H. & D. for	$5,000.00	7,000.00
15.	Crump & Field, Ashland, Ky., bill for mdse		1,401.54
16.	Covington City nat'l bank, Covington, Ky.:		
	Note of G. W. M. & M. Co., endorsed by J. Carlisle and G. W. Carlisle	2,000.00	
	Note of G. W. M. & M. Co., endorsed by J. Carlisle and G. W. Carlisle	2,500.00	
	Note of G. W. M. & M. Co., endorsed by J. Carlisle and G. W. Carlisle	2,000.00	
	Note of G. W. M. & M. Co., endorsed by J. Carlisle and G. W. Carlisle	832.50	
	Note of G. W. M. & M. Co., endorsed by J. Carlisle and G. W. Carlisle	2,500.00	
	Bill exchange, drawn by G. W. M. & M. Co. on J. Carlisle, tr., endorsed by J. Carlisle and G. W. Carlisle	809.12	
	Bill exchange, G. W. M. & M. Co., on J. Carlisle, tr., endorsed by J. Carlisle and G. W. Carlisle	1,460.00	
	Check, John Carlisle to G. W. M. & M. Co.	2,200.00	
	Check, John Carlisle to G. W. M. & M. Co	300.00	
	Note, John Carlisle and G. W. Carlisle, endorsed by G. W. M. & M. Co., collateral drafts on C. H. & D. R. R. note for $6,000, $3,000 pd. on it	3,000.00	
203			
	Bill exchange, G. W. M. & M. Co., on F. H. Short, tr., endorsed by drawer	3,000.00	20,601.62
17.	Coal Haven Harbor, Cincinnati, Ohio, care Huntington & St. Louis Tow Boat Co.; harboring barges		8.75
18.	Carlisle Coal Co., Cincinnati, Ohio:		
	Note, G. W. M. & M. Co., endorsed by J. Carlisle	800.00	
	Note, G. W. M. & M. Co., endorsed by J. Carlisle	800.00	
	Note, G. W. M. & M. Co., endorsed by J. Carlisle	600.00	
	Note, G. W. M. & M. Co., endorsed by J. Carlisle	450.00	
	Note, G. W. M. & M. Co., endorsed by J. Carlisle	650.00	
	Note, G. W. M. & M. Co., endorsed by J. Carlisle	755.95	
	Note, G. W. M. & M. Co., endorsed by J. Carlisle	425.00	

Note, G. W. M. & M. Co., endorsed by J. Carlisle.....	450.00	
Note, G. W. M. & M. Co., endorsed by J. Carlisle.....	425.00	
Note, G. W. M. & M. Co., endorsed by J. Carlisle.....	650.00	
		5,505.95
19. Cussons, May & Co., Glen Allen, Va., bill for mdse		5.25
20. Consolidated Boat Store Co., Cincinnati, O., bill for mdse		16.00
21. W. B. Carpenter & Co., Cincinnati, O., bill for mdse.....		15.68
22. John R. Davey, Cincinnati, Ohio:		
B-ll exchange, drawn by G. W. M. & M. Co., endorsed by them and John Carlisle.....	1,502.00	
204		
Same as above	1,462.00	
Same as above	1,456.00	
Same as above	1,473.00	
		5,893 00
23. J. W. Damron, Catlettsburg, Ky., bill for mdse.....		38.90
24. A. S. Elliott, ag't, J. Tome, Wilmington, Del.:		
Note, G. W. M. & M. Co., endorsed by J. Carlisle, A. S. Eliott, collateral, 100 shares stock G. W. M. & M. Co	5,300.00	
Note, G. W. M. & M. Co., endorsed by J. Carlisle and J. Tome, collateral, 100 shares Carlisle Coal Co. stock	5,300.00	
		10,600.00
25. Evans Grate & Mantel Co., Cincinnati, O., bill for mdse.....		2.70
26. Equitable national bank, Cincinnati, O.:		
Note, G. W. M. & M. Co., endorsed by J. Carlisle, G. W. Carlisle, elevated Ry. Co.....	910.11	
Same as above.....	896.40	
		1,806.51
26½ Ford, Eaton & Co., Cincinnati, O., bill for mdse		4,749.61
27. D. M. ferry & Co., Detroit, Mich., bill for mdse.....		18.25
28. John Gates & Co., Cincinnati, Ohio:		
Note, G. W. M. & M. Co.....	324.20	
Note, G. W. M. & M. Co.....	245.50	
Note, G. W. M. & M. Co.....	245.50	
		815.20
Book account, memorandum on affidavit.....		102.25
205		
29. Goldcamp Milling Co., Ironton, O., bill for mdse	763.52	
Also a note and fees.....	315.78	
		1,077.30
30. G. G. Green, Woodbury, N. J., bill for mdse.....		10.50
31. Golden Eagle Prtg. Co., Ashland, Ky., bill for mdse.....		16.75
32. Hill Bros., 564 Broadway, N. Y., bill for mdse.....		22.88
33. Hanging Rock Stove Co., Hanging Rock, O., bill for mdse.....		75.00
34. P. Hubs & Co., Cincinnati, O., bill for mdse.....		132.80
35. Howe Scale Co., Cincinnati, O., bill for mdse.....		30.00
36. Thomas Henderson & Son, Ashland, Ky., bill for mdse.....		257.28
37. Thomas Henderson & Sons, Ashland, Ky., note to G. W. M. & M. Co		230.45
38. W. R. Johnson, Crescent, W. Va., note to G. W. M. & M. Co....		785.28
39. Jeffrey Mfg. Co., Columbus, O., bill for mdse.....		25.54
40. Lowmans Sons & Co., Cincinnati, O., bill for mdse.....		279.63
41. Kruse & Bahlmann Hdwe. Co., Cincinnati, O., bill for mdse.....		48.50
41½ King Powder Co., Cincinnati, O., bill for mdse.....		96.00
42. E. A. Kinsey & Co., Cincinnati, O., bill for mdse.....		52.44
43. Logan, Gregg & Co., Pittsburg, Pa., bill for mdse.....		6.00
44. Laidlaw & Dunn Co., Cincinnati, O., bill for mdse.....		201.29
45. George W. McAlpin Co., Cincinnati, O., bill for mdse.....	381.11	
206		
Note, G. W. M. & M. Co., endorsed by J. Carlisle.....	653.34	

	Note, G. W. M. & M. Co., endorsed by J. Carlisle	653.34	
	Note, G. W. M. & M. Co., endorsed by J. Carlisle	653.34	
	Note, G. W. M. & M. Co., endorsed by J. Carlisle	653.44	
			2,994.47
46.	Manchester Planing Mill Co., Manchester, O., bill for mdse		64.35
47.	Mercantile Trust & Deposit Co., Baltimore, Md., bill for services		22.50
48.	Mitchell, Tranter & Co., Cincinnati, O., bill for mdse		55.85
49.	D. S. Martin, Catlettsburg, Ky., bill for mdse		13.34
50.	Monarch Milling Co., Mt. Sterling, Ky., bill for mdse		27.90
51.	Markell & Co., Charleston, W. Va., bill for mdse		189.94
52.	A. Mimms, Catlettsburg, Ky., bill for mdse		36.10
53.	Meinhart & Co., Ashland, Ky., bill for mdse		2.85
54.	W. Meinhart, Ashland, Ky., bill for mdse		21.80
55.	Nelsonville Foundry & Mch. Co., Nelsonville, O., bill for mdse		11.35
56.	Norton iron wks., Ashland, Ky., bill for mdse		43.80
57.	National Lafayette bank, Cincinnati, O.:		
	Bill of exchange, drawn by G. W. M. & M. Co. on C. H. & D. Ry. by J. Carlisle		3,000.00
	Note, G. W. M. & M. Co., endorsed by J. Carlisle and G. W. Carlisle and elevated Ry. Co		900.00
207			
58.	Oskamp, Nolting & Co., Cincinnati, O., bill for mdse		3.25
59.	Peacock Coal Co., Pomeroy, O., note, G. W. M. & M. Co., endorsed by J. Carlisle		767.02
60.	Peel Splint Coal Co., Lewiston, W. Va., note Peel Splint Co., endorsed by G. W. M. & M. Co., J. Carlisle, R. Ballard	808.91	
	Note, G. W. M. & M. Co., endorsed by Peel Splint Co., Geo. and J. Carlisle	858.00	
	Note, Pell Splint Co., endorsed by G. W. M. & M. Co., J. Carlisle	697.00	
	Note, maker and endorsement as above	785.54	
	Note, G. W. M. & M. Co., endorsed by J. Carlisle and Peel Splint Co	855.80	
	Note, G. W. M. & M. Co., endorsed as above	940.88	
	Note, G. W. M. & M. Co., endorsed as above	940.88	
	Note, G. W. M. & M. Co., endorsed as above	697.55	
	Note, G. W. M. & M. Co., endorsed as above	710.13	
	Note, G. W. M. & M. Co., endorsed as above	664.98	
	Note, G. W. M. & M. Co., endorsed as above	762.28	
			8,672.04
61.	Equitable national bank, Cincinnati, O., note, Post & Co., endorsed by G. W. M. & M. Co., and G. Carlisle		700.00
62.	J. A. Parker, Terre Haute, Ind., bill for mdse		16.50
63.	R. C. Poage & Son, Ashland, Ky., bill for mdse		255.92
64.	Queen City Oil Co., Cincinnati, O., bill for mdse		94.62
208			
65.	G. S. Richardson, Santee, Cal., bill for loan and salary		1,850.00
66.	F. C. Robinson, Maysville, Ky., bill for mdse		106.60
67.	T. F. Randolph, Cincinnati, Ohio, bill for mdse		9.00
68.	Robert Sellers & Co., Cincinnati, Ohio, bill for mdse		150.35
69.	Stevens Coal Co., Neave bldg., Cin'ti, O.:		
	Note of G. W. M. & M. Co., endorsed by J. Carlisle	838.30	
	Note of G. W. M. & M. Co., endorsed by J. Carlisle	822.15	
	Note of G. W. M. & M. Co., endorsed by J. Carlisle	822.15	
			2,482.60
70.	Second national bank, Ashland, Ky.:		
	Bill exch. drawn by G. W. M. & M. Co., on J. Carlisle	500.00	
	Bill exch. drawn by G. W. M. & M. Co., on J. Carlisle	400.00	

	Bill exch. drawn by G. W. M. & M. Co., on J. Carlisle	600.00	
	Note, G. W. M. & M. Co., endorsed by J. Carlisle and G. W. M. & M. Co.	1,500.00	
			3,100.00
71.	C. M. Crutcher & Co., Louisa, Ky., bill for mdse., claim against Snyder Bros.		76.59
72.	Stewart, Dunholter & Co., Cincinnati, O., bill for mdse		785.92
73.	Standard Oil Co., Louisville, Ky., bill for mdse		177.82
74.	Star lubricating oil wks., Cleveland, O., bill for mdse		60.32
75.	Tranchant & Finnell, Osborn, O., bill for mdse		208.10
76.	Von Bargen & Francke, Cincinnati, O., bill for mdse		74.67
200			
77.	Geo. D. Whitcomb, Chicago, Ill., bill for mdse		96.75
78.	Henry Wagner, Cincinnati, O., bill for mdse		13.39
79.	West Virginia Tob. Co., Wheeling, W. Va., bill for mdse		92.00
80.	Wilson, Bailey & Co., Pittsburg, Pa., bill for mdse		24.00
81.	Western Union Tel. Co., Ashland, Ky., bill for mdse		1.68
82.	B. Williamson & Co., Catlettsburg, Ky., bill for mdse		47.20
83.	R. Wurlitzer & Co., Cincinnati, O., bill for mdse		12.60
84.	Webb Stationery Co., Cincinnati, O., bill for mdse		30.00
85.	Lewis Wald & Co., Cincinnati, Ohio, bill for mdse		99.25
86.	Wichle Soap Co., Ironton, O., bill for mdse		17.40
87.	Yellow Poplar Lumber Co., Coal Grove, O., bill for mdse		51.48
88.	Carrollton nat'l bank, Carrollton, Ky., note G. W. M. & M. Co., endorsed by J. Carlisle, Told & Davis		733.14
89.	Norwalk iron works, South Norwalk, Ct., bill for mdse		36.10
90.	Marshall McDonald, Pittsburg, Pa.:		
	Note G. W. M. & M. Co., order J. Carlisle, endorsed J. Barrett & Sons	$21.23	
	Note, Gt. W. M. & M. Co., endorsed as above	740.00	
	Note, G. W. M. & M. Co., endorsed J. Carlisle	1,077.39	
			3,238.52
91.	The Mercantile Trust & Safe Deposit Co., for balance due on mortgage bonds to be hereafter ascertained, being the differ-		
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	ence between amount due on mortgage bonds, to-wit: $318,675 to date of decree, and the amount which may be paid them on final distribution of proceeds of sale of property		122,221.32

SCHEDULE "B."

1.	Huff, Andrews & Thomas, Roanoke, Va., bill for mdse	$172.11
2.	M. C. Kirk, Valparaiso, Ind., bill for labor and work	147.65
3.	King Powder Co., Cincinnati, O., bill for mdse. (carload of powder)	520.00

EXHIBIT "111."

United States Circuit Court in and for the District of Kentucky.

SAMUEL WOODWARD, Assignee of John Carlisle, Plaintiff,
vs.
THE GREAT WESTERN MINING & MFG. CO. *et al.*, Defendants.

No. 1799. Report of Master.

Now comes the master and reports that he made the advertisement requiring creditors to file claims against the Great Western Mining & Mfg. Co., as directed by order of the court; that there has been presented to him claims, as shown by the annexed Schedule "A."

This schedule contains a list of general creditors with brief statement of the character of the claim and its amount.

211 Attention is called to the pending suit of L. F. Murray. Said action is pending at Louisa, Lawrence county, Kentucky. Should it result in a judgment the judgment holder would be in a position of a general creditor. Reservation should be made in the order of distribution as to this possible claim.

The claims of Huff, Andrews and Thomas and M. C. Kirk have been disposed of by order of court heretofore made.

Respectfully submitted, L. C. BLACK, *Master*.

SCHEDULE "A."

1.	Ashland national bank, Ashland, Ky., R. D. Davis, Ashland, Ky., attorney, judgment on bill of exchange	$845.70
2.	Ashland Dry Dock Company, Ashland, Ky., repairs of barges	223.13
3.	Ashland fdy. mchn. works, Ashland, Ky., bill for mdse	22.81
4.	American Book Company, Cincinnati, O., bill for mdse	51.32
5.	Argand Refining Company, Marietta, O., bill for mdse	9.81
6.	J. C. Ayer & Co., Lowell, Mass., bill for mdse	4.00
7.	Ashland Coal & Iron Co., Ashland, Ky., bill for mdse	20.54
8.	S. W. Bard, Cincinnati, Ohio, note, G. W. M. & M. Co., endorsed by J. Carlisle	893.54
9.	Ball-Warfield Drug Co., Ironton, Ohio, bill for mdse	15.20
10.	H. H. Barton & Co., Catlettsburg, Ky., bill for mdse	102.14
11.	F. J. Billings & Co., Cincinnati, Ohio, bill for mdse	15.80
12.	Big Sandy Potter Co., Catlettsburg, Ky., bill for mdse	5.35

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13.	Cincinnati Volksblatt Co., Cincinnati, O., loan with collateral note, J. and G. W. Carlisle, 200 shares G. W. M. & M. Co., stock order on C. H. & D. for $3,000	7,000.00
14.	Crump & Field, Ashland, Ky., bill for mdse	1,491.54
15.	Covington City national bank, Covington, Ky.: Note, G. W. M. & M. Co., endorsed J. Carlisle and G. W. Carlisle	2,000.00

Note, G. W. M. & M. Co., endorsed J. Carlisle and G. W. Carlisle	2,500.00	
Note, G. W. M. & M. Co., endorsed J. Carlisle and G. W. Carlisle	2,000.00	
Note, G. W. M. & M. Co., endorsed J. Carlisle and G. W. Carlisle	832.50	
Note, G. W. M. & M. Co., endorsed J. Carlisle and G. W. Carlisle	2,500.00	
Bill exch. drawn by G. W. M. & M. Co. on J. Carlisle, tr. endorsed J. Carlisle and G. W. Carlisle	809.12	
Bill exch. drawn by G. W. M. & M. Co. on J. Carlisle, tr. endorsed by J. Carlisle and G. W. Carlisle	1,460.00	
Check John Carlisle to G. W. M. & M. Co.	2,200.00	
Check John Carlisle to G. W. M. & M. Co. $300.00		
Credit 63.15	236.85	
Bill exch. G. W. M. & M. Co. on F. H. Short, tr., endorsed by drawer.	3,000.00	17,538.47

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16. Val. P. Collins, Cincinnati, Ohio, note		799.13
17. Coal Haven Harbor, Cincinnati, Ohio, care Huntington and St. Louis Towboat Co., harboring barges		8.75
18. Carlisle Coal Company, Cincinnati, Ohio, C. D. Robertson, attorney:		
Note G. W. M. & M. Co., endorsed by J. Carlisle	800	
Note G. W. M. & M. Co. endorsed by J. Carlisle	900	
Note G. W. M. & M. Co. endorsed by J. Carlisle	450	
Note G. W. M. & M. Co. endorsed by J. Carlisle	650	
Note G. W. M. & M. Co. endorsed by J. Carlisle	755.95	
Note G. W. M. & M. Co. endorsed by J. Carlisle	425	
Note G. W. M. & M. Co. endorsed by J. Carlisle	450	
Note G. W. M. & M. Co. endorsed by J. Carlisle	425	
Note G. W. M. & M. Co. endorsed by J. Carlisle	650	5,505.95
19. Cussons, May & Co., Glen Allen, Ky., bill for mdse		5.25
20. Consolidated Boat Store Co., Cincinnati, Ohio, bill for mdse		16.00
21. W. B. Carpenter & Co., Cincinnati, O., bill for mdse		15.68
22. John R. Davey, Cincinnati, Ohio, Bromwell & Bruce, attorneys:		
Bill exchange, drawn by G. W. M. & M. Co., endorsed by them and John Carlisle	1,502.00	
Same as above	1,462.00	
Same as above	1,456.00	
Same as above	1,473.00	5,893.00

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23. J. W. Dameron, Catlettsburg, Ky., bill for mdse		38.90
24. A. S. Elliott, ag't J. Tome, Wilmington, Del.:		
Note, G. W. M. & M. Co., endorsed by J. Carlisle, A. S. Elliott, collateral, 100 shares stock G. W. M. & M. Co.	5,300.00	
Note, G. W. M. & M. Co., endorsed by J. Carlisle and J. Tome, collateral 100 shares Carlisle Coal Co. stock	5,300.00	10,600 00
25. Evans Grate and Mantel Co., Cincinnati, Ohio, bill for mdse		2 70
26. Equitable national bank, Cincinnati, Ohio, D. Heinsheimer, attorney:		
Note, G. W. M. & M. Co., endorsed by J. C. Carlisle, G. W. Carlisle, elevated Ry. C. Co	910.11	
Same as above	896.40	1,806.51
27. D. M. Ferry & Co., Detroit, Mich., bill for mdse		18.25

28. Ford, Eaton & Co., Cincinnati, Ohio, Willby & Wald, attorneys:
Bill for mdse. 4,749.61

29. John Gates & Co., Cincinnati, Ohio:
Note, G. W. M. & M. Co 324.20
Note, G. W. M. & M. Co 245.50
Note, G. W. M. & M. Co 245.50
Note, G. W. M. & M. Co. 815.20
Book account, memorandum on affidavit. 102.25

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30. Goldsamp Milling Co., Ironton, Ohio, bill for mdse. 763.52
Also a note and fees. 313.78 1,077.30

31. G. G. Green, Woodbury, N. J., bill for mdse. 10.50
32. Golden Eagle Prtg. Co., Ashland, Ky., bill for mdse. 16.75
33. Hill Bros., 564 Broadway, New York, bill for mdse. 22.88
34. Hanging Rock Stove Co., Hanging Rock, O., bill for mdse. 75.90
35. P. Huber & Co., Cincinnati, Ohio, bill for mdse. 132.80
36. Howe Scale Co., Cincinnati, Ohio, bill for mdse. 30.00
37. Thomas Henderson & Son, Ashland, Ky., R. D. Davis, Ashland, Ky.:
Note, G. W. M. & M. Co. 257.28
38. Thomas Henderson & Son, Ashland, Ky., R. D. Davis, Ashland, Ky.:
Note, G. W. M. & M. Co. 230.45
39. W. R. Johnson, Crescent, W. Va., R. D. Jones, att'y:
Note, G. W. M. & M. Co. 795.05
40. Jeffrey Mfg. Co., Columbus, Ohio, bill for mdse. 24.54
41. Lowman Sons & Co., Cincinnati, Ohio, bill for mdse. 279.63
42. Johnston & Poage, Ashland, Ky., bill for mdse. 75.75
43. Kruse & Bahlman H'd'w'e Co., Cincinnati, O., bill for mdse 48.50
44. King Powder Co., Cincinnati, Ohio, bill for mdse. 616.00
45. E. A. Kinsey & Co., bill for mdse 52.44
46. Lysle Coal Co., Pittsburg, Pa., C. W. Baker, att'y:
Check 704.05

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47. Logan, Gregg & Co., Pittsburg, Pa., bill for mdse. 6.00
48. Laidlaw & Dunn Co., Cincinnati, Ohio, bill for mdse. 201.29
49. George W. McAlpin Co., Cincinnati, Ohio, Daniel Wilson, att'y:
Bill for mdse 381.11
Note, G. W. M. & M. Co., endorsed by J. Carlisle. 653.34
Note, G. W. M. & M. Co., endorsed by J. Carlisle. 653.34
Note, G. W. M. & M. Co., endorsed by J. Carlisle. 653.34
Note, G. W. M. & M. Co., endorsed by J. Carlisle. 653.34 2,994.47

50. L. F. Murray, Louisa, Ky., Stewart & Stewart, attorneys:
Suit for damages pending in the sum of 2,000.00
51. Manchester Planing Mill Co., Manchester, Ohio, bill for mdse. 64.35
52. Mercantile Trust & Deposit Co., Baltimore, Md., bill for services. . . 22.50
53. Mitchell, Tranter & Co., Cincinnati, O., bill for mdse. 55.85
54. D. S. Martin, Catlettsburg, Ky., bill for mdse. 13.34
55. Monarch Milling Co., Mt. Sterling, Ky., bill for mdse. 27.90
56. Markell & Co., Charleston, W. Va., bill for mdse. 189.94
57. A. Mims, Catlettsburg, Ky., bill for mdse 36.10
58. W. Meinhart, Ashland, Ky., bill for mdse 85.10
59. Nelsonville Fdy. Mch., Nelsonville, O., bill for mdse. 11.35
60. Norton iron works, Ashland, Ky., bill for mdse. 43.80

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61. National Lafayette bank, Cincinnati, Ohio:
Bill of exch., drawn by G. W. M. & M. Co. on C. H. & D. Ry., endorsed by J. Carlisle. 3,000.00
Note, G. W. M. & M. Co., endorsed by J. Carlisle and G. W. Carlisle and Elevated C. Co. 900.00 3,900.00

62.	Oskamp, Nolting & Co., Cincinnati, Ohio, bill for mdse		3.25
63.	Peacock Coal Company, Pomeroy, Ohio, note, G. W. M. & M. Co., endorsed by J. Carlisle		767.02
64.	Peel Splint Coal Co., Lewiston, W. Va., Peck & Shaeffer, attorneys:		
	Note, Peel & Splint Coal Co., endorsed by G. W. M. & M. Co., J. Carlisle, R. Ballard	808.91	
	Note, G. W. M. & M. Co., endorsed by Peel Splint C. Co. and J. Carlisle	858.00	
	Note, Peel Splint C. Co., endorsed by G. W. M. & M. Co., J. Carlisle and R. Ballard	697.00	
	Note, maker and endorsement as above	735.54	
	Note, G. W. M. & M. Co., endorsed by J. Carlisle and Peel Splint C. Co	855.59	
	Note, G. W. M. & M. Co., endorsed as above	940.88	
	Note, G. W. M. & M. Co., endorsed as above	940.88	
	Note, G. W. M. & M. Co., endorsed as above	697.55	
	Note, G. W. M. & M. Co., endorsed as above	710.13	
218			
	Note, G. W. M. & M. Co., endorsed as above	664.98	
	Note, G. W. M. & M. Co., endorsed as above	762.28	
			8,672.04
65.	Equitable national bank, Cincinnati, O., D. Heinsheimer, attorney:		
	Note, Post & Co., endorsed by G. W. M. & M. Co., and G. Carlisle		700.00
66.	J. A. Parker, Terre Haute, Ind., bill for mdse		10.50
67.	R. C. Poage & Son, Ashland, Ky., bill for mdse		255.92
68.	Queen City Oil Co., Cincinnati, O., bill for mdse		94.62
69.	G. S. Richardson, Santee, Cal., bill for loan and salary		1,850.00
70.	E. C. Robinson, Maysville, Ky., bill for mdse		106.00
71.	T. F. Randolph, Cincinnati, Ohio, bill for mdse		9.00
72.	Robert Sellers & Co., Cincinnati, Ohio, bill for mdse		150.35
73.	Stevens Coal Co., Neave bldg., Cincinnati, Ohio:		
	Note of G. W. M. & M. Co., endorsed by J. Carlisle	838 30	
	Note of G. W. M. & M. Co., endorsed by J. Carlisle	822.15	
	Note of G. W. M. & M. Co., endorsed by J. Carlisle	822.15	
			2,482.60
74.	Second national bank, R. D. Davis, attorney:		
	Bill exchange by G. W. M. & M. Co. on J. Carlisle	600.00	
	Bill of exchange, same as above	400 00	
	Bill of exchange, same as above	600.00	
219			
	Note, G. W. M. & M. Co., endorsed by J. Carlisle and G. W. M. & M. Co	1,500.00	
			3,100.00
75.	C. M. Crutcher & Co., Louisa, Ky., bill for mdse., less claim against Snyder Bros		41.00
76.	Stewart, Dunholter & Co., Cincinnati, Ohio, bill for mdse		785.92
77.	Standard Oil Co., Louisville, Ky., G. W. Skaggs, Louisa, Ky.: Bill for mdse		177.82
78.	Star lubricating oil w'ks, Cleveland, O., bill for mdse		60.32
79.	Tranchant & Finnell, Osborn, Ohio, G. W. Skaggs, Louisa, Ky.: Bill for mdse		208.10
80.	Von Bargen & Francks, Cincinnati, Ohio, bill for mdse		74.67
81.	George D. Whitcomb, Chicago, Ill., bill for mdse		96.75
82.	Henry Wagner, Cincinnati, Ohio, bill for mdse		13.39
83.	West Virginia Tob. Co., Wheeling, W. Va., bill for mdse		92.00
84.	Wilson, Bailey & Co., Pittsburg, Pa., bill for mdse		24.00
85.	Western Union Telegraph Co., Ashland, Ky., bill for mdse		1.68
86.	B. Williamson & Co., Catlettsburg, Ky., bill for mdse		47.20
87.	R. Wurlitzer & Co., Cincinnati, O., bill for mdse		12.60
88.	Webb Stationery Co., Cincinnati, O., bill for mdse		30.00
89.	Lewis Wald & Co., Cincinnati, O., bill for mdse		99.25

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90.	Wiehle Soap Co., Ironton, O., bill for mdse.		17.40
91.	Yellow Poplar Lumber Co., Coal Grove, O., bill for mdse.		51.48
92.	Carrollton nat'l bank, Carrollton, Ky.: Note, G. W. M. & M. Co., endorsed by J. Carlisle, Todd & Davis.		733.14
93.	Marshall McDonald, Pittsburg, Pa., C. B. Simrall, attorney: Note, G. W. M. & M. Co., order J. Carlisle, endorsed by J. Barrett & Sons	821.22	
	Note, G. W. M. & M. Co., endorsed as above	740.03	
	Note, G. W. M. & M. Co., endorsed J. Carlisle	1,677.30	
			3,238.55
			$96,650.97

Exhibit "112."

United States Circuit Court, District of Kentucky, December Term.

Saturday, *January* 27, *A. D.* 1894.

Court met.
Present: Hon. Wm. H. Taft, circuit judge.

Samuel Woodward, Assignee, Plaintiff,
vs.
The Great Western Mining & Manufacturing Co., etc., Defendant. } No. 1799.

This cause coming on for hearing upon the order of sale
221 heretofore issued herein upon the decree entered in favor of The Mercantile Trust and Deposit Company, of Baltimore, Maryland, trustee, and the return thereto of the master commissioner appointed in said decree, to make said sale, and the motion of said Mercantile Trust and Deposit Company to confirm the said sale, and the court being fully advised in the premises and having examined the proceedings and the return of said master commissioner finds—

That the proceedings of the special master in advertising the said property and making the said sale were in all respects in conformity with the law and the orders of this court, and they are accordingly approved and confirmed:

The court further finds after due advertisement the said property was offered for sale at the door of the court house in Covington, State of Kentucky, on the 23rd day of December at the hour of 10 o'clock a. m., at public auction, and that at said sale Henry P. Scott, Samuel Bancroft, Jr. and Martin Lane bid for said property, to-wit., all except the stock of goods in the store mentioned in said decree, the sum of seventy thousand ($70,000) dollars, which was the best and highest bid therefor, and more than two-thirds of the appraised value thereof; and at the same time and place, in accordance with said order, there was offered the stock of goods in the store and the said stock of goods was struck off to said Henry P. Scott, Samuel

Bancroft, Jr. and Martin Lane, for the sum of five thousand, six hundred and sixty-six and 66-100 dollars ($5,666.66), which was the highest and best bid therefor, and said bidders deposited with the said master the sum of ten thousand dollars ($10,000), in accordance with the order of the court.

It is therefore ordered, adjudged and decreed that said respective sales be and the same are hereby confirmed and said master commissioner is directed to convey by proper deeds of conveyance or bill of sale all of the said property so sold to the said purchasers; and it is directed that said $5,666.66, the price bid on said goods be paid in cash on delivery of the same hereunder; that the said sum of ten thousand dollars, already deposited, be now accepted and received as part of the purchase price of said property other than said stock of goods, and a credit upon the said sum for which the said property sold, and the purchasers are authorized to pay the balance of the unpaid purchase money by turning over to said master
222 the bonds of said company or other claims against the said company in the order of their priority at such sums as upon final distribution herein said bonds or other claims would be entitled to receive upon said distribution, but nevertheless, the said sale having been made upon the order of this court whereby the court reserved to itself the power and right to call for as much of said purchase money in cash as may be adjudged necessary to pay the costs in this cause and the receiver's fee and expenses and for the purpose of paying such other claims as are not turned in by the purchasers such proportion as they may be entitled to upon final distribution herein in the order of their priority and,

It is directed that in making the conveyance to the purchasers herein a clause be inserted reserving the same power as aforesaid to the court in relation to the purchase money as was reserved in the decree heretofore rendered and under which this sale was made; and also reserving a power to resell said premises in this cause for default of payment of the purchase money, in accordance with the orders of the court hereafter to be made.

All other questions relating to the priority of claims and distribution of proceeds of the sale are reserved for the further orders of the court and this cause is adjourned for that purpose.

UNITED STATES OF AMERICA, }
District of Kentucky, } *ss:*

I, Jos. C. Finnell, clerk of the United States circuit court of the sixth judicial circuit and district of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of an entry made in the case set out in the caption hereto as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said court, at Covington, this 31st day of March, A. D. 1900.

Ten cent inter. rev. stamp.

[L. S.] JOS. C. FINNELL, *Clerk.*

223 EXHIBIT "113."

United States Circuit Court, District of Kentucky.

SAMUEL WOODWARD, Assignee, etc., Plaintiff,
vs.
THE GREAT WESTERN MINING AND MANUFACTURING Co. and The Mercantile Trust Deposit Co. of Baltimore, Defendants. } No. 1799.

THE MERCANTILE TRUST AND DEPOSIT COMPANY OF Baltimore
vs.
THE GREAT WESTERN MINING & MANUFACTURING Company and The Ohio and Big Sandy Railroad Company. } No. 1799.

Order of Distribution., etc., etc.

This day this cause came on again to be heard on the bill of complaint of Samuel Woodward, assignee, the answers thereto, the evidence and exhibits, the motion of the Mercantile Trust & Deposit Company of Baltimore, for an order fixing the priorities of claims against the Great Western Mining and Manufacturing Company, and ordering distribution of the proceeds of the sale of the property of said company, the claims of various creditors heretofore filed herein, the demurrer of the said Mercantile Trust & Deposit Company to the intervening petition of the Second National Bank of Ashland, Kentucky, and others, and other matters hereinafter disposed of, was argued by counsel and was submitted to the court, and thereupon on consideration thereof,

It is ordered, adjudged, and decreed, as follows, to-wit:

First. That Samuel Woodward, assignee of John Carlisle, failed to show any indebtedness of the Great Western Mining and Manufacturing Company to him, and is not entitled to a decree
224 finding anything to be due on account of matters in said bill set forth, or to the allowance of his claim in the sum of $26,469.75, heretofore presented under order of the court heretofore made herein, and said claim is disallowed.

Second. The mortgage or deed of trust of said mining company to the said Mercantile Trust and Deposit Company, of Baltimore, heretofore foreclosed, was and is the first and best lien on all the property, rights, franchises, etc., heretofore sold herein, and the proceeds thereof, amounting to the sum of $70,000, which said sum, after payment of costs and fees, as hereinafter ordered, is applicable to the payment of the amount heretofore found due to the said Mercantile Trust and Deposit Company of Baltimore, on account of the bonds and interest, and interest thereon, secured by said mortgage

or deed of trust, to-wit: the sum of $318,675, with interest from October 16th. 1893.

That the balance of said sum of $318,675, with interest from said date, after the application of the proceeds of said sale, as aforesaid, thereto, is a claim against the said Great Western Mining & Manufacturing Co. and its assets, and as such is entitled to share in the distribution of the same.

Third. That the proceeds of the sale of the goods in the store, amounting to the sum of $5,666.67, and the additions thereto, if any, is not covered by the terms of said mortgage or deed of trust, and is a general asset of said company, to be shared in by all the creditors thereof ratably.

Fourth. That the claims heretofore presented to L. C. Black, under order of the court, to which no exceptions have been taken, are just and valid claims against said Great Western Mining & Manufacturing Co., and as such, are allowed in the amounts and to the parties hereinafter stated and permitted to share in the distribution of the funds of said company as hereinafter directed. Said claims are contained in Schedule " A," hereto attached.

Fifth. That that claim of the Peacock Coal Company and all other claims, to which no exception has been taken, are hereby continued fourteen days for the purpose of allowing said claimants to prove by deposition their claims, and if said proof is not presented within said time they are hereby disallowed, except the claims of the Carlisle Coal Company, of Cincinnati, and the Cincinnati Volksblatt Company, as to the former of which, namely, the
225 Carlisle Coal Company, the court allows the same in the amount shown in Schedule "A," hereto attached, to-wit: $5,496.13, and overrules said exceptions, and as to the latter of which, to-wit: the claim of the Cincinnati Volksblatt Company, the court allows the same to be withdrawn at the instance of said Volksblatt Company, as not presented as a claim against said The Great Western Mining and Mfg. Co.

Sixth. That the demurrer of the Mercantile Trust & Deposit Company to the intervening petition of the Second National Bank, of Ashland, Kentucky, and others, heretofore filed herein, on December 19th, 1893, is hereby sustained and said intervening petition is dismissed, but said claims set up in said intervening petition have been presented under the former order of the court, and are, under paragraph fourth hereof, allowed as claims against the general assets of said company.

Seventh. And it appearing to the court that there is in the hands of the receiver a fund, the result of the operation of said company, and also that there is in the hands of the special master or subject to the order of the court, the said fund of $70,000, the proceeds of the sale of the said mining property, and the sum of $5,666.67, less certain payments heretofore ordered to be made out of the same, the proceeds of the said stock of goods in the store, as appears herein, the court, coming now to distribute the said several funds:

It is ordered, First. As to the fund in the hands of the receiver, that the said L. C. Black, receiver, out of the same pay:

a. The clerk of the court the costs of this action, including $75 to each of the appraisers, which are hereby taxed as part of the costs and including complainant's costs and including the deposition taken by him, as to which deposition the clerk is directed to tax in the costs the sum of $90, when filed, in favor of Harry Wernke.

b. To L. C. Black, receiver and special master, for his fees and allowances as such, and for services from September 12th, 1892, to March 24th, 1894, the sum of $4,500.

c. To Matthews & Cleveland, attorneys for L. C. Black, receiver, for services rendered, the sum of $1,300.

d. To Jones & James, attorneys for the services rendered the said receiver, the sum of $500.

e. The balance left in the hands of the receiver, if any, after the payment of said costs, fees and allowances, to be divided be-
226 tween the fund resulting from the sale of the mining property and the fund resulting from the sale of the goods in the store on the property, in the proportion that $70,000 bears to $5,666.67, at such times as the court may hereafter direct.

Second. The fund in the hands of L. C. Black, master commissioner, arising from the sale of said property, in case the funds in his hands, as receiver, are not sufficient to pay all the above costs, fees and allowances, is to be distributed as follows:

a. The balance of any such costs in the amount and proportion that the amount of said fund, to-wit: $70,000, bears to the amount of the fund resulting from the sale of the stocks of goods in the store, to-wit: $5,666.67.

b. To Mallon, Coffey & Mallon, solicitors for the Mercantile Trust and Deposit Company, of Baltimore, and the said trust company, which the court finds has in all respects complied with and performed its duties as trustee, the court by virtue of an agreement heretofore made between the said trust company and a committee representing the bondholders, allow- out of said sum of $70,000, the sum of $1,500.

c. The allowance to Matthews & Cleveland, solicitors for the executive committee of the bondholders, who asked by virtue of an agreement between said trust company, the foreclosure of the trust mortgage, and to John C. Welty, is continued for two weeks, and until further order of the court.

d. The balance of the said sum of $70,000 is to be divided proportionately among the holders of the bonds upon which, as heretofore found herein, there is due the sum of $318,675, with interest from October 16th, 1893, said distribution to be delayed for two weeks from the entry of this decree to permit the court to make allowances for the said solicitors as aforesaid.

It is further ordered that the holders of the said bonds forthwith file the same with the said special master, who is to endorse thereon the date of filing thereof, and, upon the distribution of the balance

of said fund, the said special master is directed to endorse upon each of the said bonds the amount so paid on account thereof.

It is further ordered that the purchaser may pay into court and apply upon the purchase price of said property any of said mortgage bonds in the amount of proportion which shall be applicable
227 to their liquidation upon final distribution herein and, upon receipt of said bonds sufficient in amount to pay the balance of the said purchase price and all the other costs and fees and allowances herein made or hereinafter, in this cause, to be made, the said special master is ordered and directed to make the purchasers of the said property a deed, reciting that all conditions of the said sale have been complied with, and said property is released from the lien heretofore retained by the court thereinto secure the payment of the said purchase price.

Third. As to the fund in the hands of the receiver from the proceeds of the sale of the stock of goods in the store, as well as the distributive share that said fund may be entitled to of any balance which may be in the hands of the receiver, after paying the costs, fees and allowances, as above specified, it is *ordered and directed* by the court to be distributed as follows:

a. To the payment of the costs that may be properly chargeable against said fund, as heretofore ordered;

b. The balance to be distributed ratably between the creditors of said company, whose claims are allowed herein, or whose claims may be hereinafter allowed as above specified.

It further appearing to the court that there is a suit in West Virginia, to which said receiver is a party, still undisposed of, and also certain other matters still pending.

It is further ordered by the court, that the receiver after paying the costs, fees and allowances out of said fund in his hand aforesaid, retain the balance, if any, for the purpose of meeting any obligations, the result of such unfinished business.

It further appearing to the court that it may become necessary for the receiver to institute certain suits against former managers of said company to recover a large sum of money belonging to said company,

It is ordered that until the determination of said matters, the lien reserved in the decree, heretofore made herein on the property so sold, together with $1,000 from the fund, being the proceeds of the sale of the stock of goods, be retained by the special master, until further order of the court, for the purpose of meeting any necessary expenses in the conduct of such litigation, should the same be instituted.

228 It further appearing to the court that the receiver has not yet collected of the amount due him a sufficient sum to pay the costs, fees and allowances aforesaid,

It is ordered that he pay the same out of the fund in his hand as special master, and, upon the collection of said amounts due him as receiver, to repay said fund the sum so taken from said fund and

charged heretofore in this decree to the fund in his hands as receiver.

It further appearing to the court that the purchasers of the stock of goods and of the property are the same, and that the said stock of goods has not yet been paid for,

It is ordered that upon the said purchasers paying into said fund the result of the sale of said goods, an amount sufficient to pay the prior claims heretofore allowed against said fund, the $1,000, to be retained in the hands of the receiver as aforesaid, and a dividend to all the creditors of said company, other than said Mercantile Trust & Deposit Company of Baltimore, and upon the filing with said master of the receipt of the said Mercantile Trust and Deposit Company of Baltimore, for its distributive share of said dividends upon its claims that the said payment and the said receipt shall be taken as and for a payment for said stock of goods, and the master can deliver a bill of sale therefor.

The claims excepted to, continued as aforesaid, as well as the claim of G. L. Murray, now in litigation, and all other claims, not contained in Schedule "A," are all hereby continued for further order of the court, and this cause is continued for further orders of the court.

WM. H. TAFT,
Circuit Judge.

March 27th, 1894.

SCHEDULE "A."

List of Claims against the Great Western Mining and Manufacturing Company.

1.	Ashland national bank	$846.70
2.	Ashland Dry Dock Company	223.13
3.	Ashland foundry & machine works	22.81
4.	American Book Company	51.32
5.	Argand Refining Company	9.81
6.	J. C. Ayer & Company	4.00
7.	Ashland Coal & Iron Company	29.54
8.	S. W. Bard	803.54
9.	Ball-Warfield Drug Company	15.20
10.	R. R. Barton & Co.	102.14
229 11.	F. I. Billings & Co.	150.80
12.	Big Sandy Pottery Co.	5.35
13.	Crump & Field	1,491.54
14.	Covington City national bank	17,538.47
15.	Coal Haven Harbor Co.	8.75
16.	C. M. Crutcher & Co.	41.00
17.	Cussons, May & Co.	5.25
18.	Consolidated Boat Store Company	16.00
19.	W. B. Carpenter & Co.	15.68

20.	John R. Davey	5,893.00
21.	J. W. Dameron	38.90
22.	A. S. Elliott, ag't, J. Tome	10,600.00
23.	Evans Grate & Mantel Co	.70
24.	Equitable national bank	2,506.51
25.	D. M. Ferry & Co	18.25
26.	Ford, Eaton & Co	4,749.61
27.	John Gates & Co	917.45
28.	Goldcamp Milling Co	1,077.30
29.	G. G. Green	10.50
30.	Golden Eagle Printing Company	16.75
31.	Hill Brothers	22.88
32.	Hanging Rock Stove Co	75.90
33.	P. Huber & Co	132.80
34.	Howe Scale Co	30.00
35.	Thomas Henderson & Son	487.73
36.	W. R. Johnson	795.05
37.	Johnson & Poage	75.75
38.	Jeffrey Mfg. Co	24.54
39.	Lysle Coal Co	704.05
40.	Lowmons' Sons & Co	279.63
41.	Kruse & Bahlman Hardware Co	48.50
42.	The King Powder Co	616.00
43.	Logan, Gregg & Co	6.00
44.	E. A. Kinsey & Co	52.44
45.	Laidlaw-Dunn Co	201.29
46.	Geo. W. McAlpin Co	2,994.47
47.	Manchester Planing Mill Co	64.35
48.	Mercantile Trust & Deposit Co	22.50
49.	Meinhart & Co	85.10
50.	Mitchell, Tranter & Co	55.85
51.	D. S. Martin	13.34
52.	Monarch Milling Co	27.90
53.	Markel & Co	189.94
54.	A. Mims	36.10
	55. Nelsonville Foundry & Mche. Co	11.35
230	56. Norton iron wks	43.80
	57. National Lafayette bank	3,900.00
58.	Oskamp, Nolting & Co	3.25
59.	Peel Splint Coal Co	8,672.04
60.	J. A. Parker	16.50
61.	R. C. Poage & Son	255.92
62.	Queen City Oil Co	94.62
63.	G. S. Richardson	1,850.00
64.	E. C. Robinson	106.00
65.	T. F. Randolph	9.00
66.	Robert Sellers & Co	150.35
67.	Stevens Coal Co	2,482.60
68.	Second national bank, Ashland, Ky	3,100.00

69.	Stewart, Dunholter & Co	784.92
70.	Standard Oil Co., Louisville, Ky	177.82
71.	Star lubricating oil wks	60.32
72.	Trenchant & Finnell	208.10
73.	Von Bargen & Francke	74.67
74.	Geo. D. Whitcomb	96.75
75.	Henry Wagner	13.39
76.	West Virginia Tobacco Co	92.00
77.	Wilson, Bailey & Co	24.00
78.	Western Union Tel. Co	1.68
79.	B. Williamson & Co	47.20
80.	R. Wurlitzer & Co	12.60
81.	The Webb Stationery Co	30.00
82.	Lewis Wald & Co	99.25
83.	Wiehle Soap Co	17.40
84.	Yellow Poplar Lumber Co	51.48
85.	Carrollton national bank	733.14
86.	Norfolk iron works	36.10
87.	Marshal McDonald	3,238.52
88.	Huff, Andrews & Thomas	172.11
89.	Mercantile Trust & Deposit Co., of Baltimore, balance due on bonds, after applying proceeds of sale of mortgaged property	
90.	Val P. Collins	799.13
91.	Carlisle Coal Co	5,496.13

I have not written E. J. & Co., on this subject.

231 EXHIBIT "114."

Brattleboro savings bank.

Assets, Jan. 1, 1889, $1,087,607.55.

B. D. Harris, president; O. D. Esterbrook, vice-president; C. A. Harris, treasurer.

BRATTLEBORO, VT., *June 3d*, 1889.

John Carlisle, Esq.

DEAR SIR: Yours from Wilmington rec'd. I do not at all like the scheme for our company to take any responsibility to maintain prices on the stock market, and thus put ourselves in the position to buy back our own bonds and stock, almost at once and quite lik-ly at a much higher price than we sold for. I don't believe our company should go into buying and selling its own stock and bonds in a speculative way. I consented, very reluctantly, as you know, to accept the offer of Elliott, Johnson & Co. to place our bonds, upon terms that I deemed almost ruinously liberal on our part, because I

believe they could and would close out the whole issue of bonds and make an end of the matter almost at once, and that thus we should have a positive and definite result, having no risks or contingencies about it, upon which we could rely and make safe plans for the future. We give them a very big margin on our securities, out of which they will make (and I find no fault with this) very unusually large profits. It therefore seems to me that they and not we, should take the responsibility and risks, if any there are, of listing the securities and maintaining them on the stock market. It was no part of our original *plans with Elliott & Co.* that we should engage in this business, and did not enter at all into our arrangement with them. Our plan was to sell $300,000 bonds with $150,000 stock, outright, and positively, for the net sum of $255,000, and not to buy at all. As I look upon it now, it would be both unwise and unsafe for us to adopt the plan proposed.

Very truly yours, B. D. HARRIS.

Clerk's office, U. S. circuit court, district of Vermont.

BURLINGTON, *February 5th*, 1903.

I hereby certify that the above and foregoing are true
232 copies of orator's original Exhibits Nos. 2, 9, 10, 11, 12, 13, 14, 15, 16 to 66, inclusive; 67 to 92 inclusive; 93, 94, 95, 96, 97, 98, 99, 100, 105, 106, 107*a*, 108, 109, 110, 111, 112, 113 and 114, attached to orator's testimony in case of The Great Western Mining & Manufacturing Company *vs.* Charles A. Harris, *et al.*, now remaining on file in my office.

[SEAL OF COURT.] GEO. E. JOHNSON, *Clerk*.

233 United States Circuit Court of Appeals for the Second Circuit, October Term, 1903.

Submitted October 23, 1903; decided December 16, 1903.

THE GREAT WESTERN MINING AND Manufacturing Company, by L. C. Black, Receiver, Complainant—Appellant,
vs.
CHARLES A. HARRIS ET AL., as Executors, etc., Defendants—Appellants.

No. 12. Appeal from the Circuit Court of the United States for the District of Vermont.

Before Judges Lacombe, Townsend, and Coxe.

This cause comes here by cross-appeals from a decree of the United States circuit court for the district of Vermont, in favor of the complainant for $15,000, and dismissing all the other claims made in a

bill brought in the name of The Great Western Mining and Manufacturing Company, a citizen of Kentucky, by L. C. Black, its receiver, by virtue of the authority vested in him under an order of the United States circuit court for the district of Kentucky, appointing him receiver of the property and assets of said company, and directing him to institute suits against the shareholders and directors of said company for the recovery of sums lost to said company by the withdrawal of certain moneys by its stockholders and officers, by the issuance of stock to them without consideration, and through negligence and mismanagement of its board of directors.

TOWNSEND, *Circuit Judge:*

The complainant, a Kentucky corporation, by this bill asks for an accounting and damages from the estate of defendant's
234 testator, B. D. Harris, who was a resident of Vermont, and was an officer, director and stockholder in said corporation from 1883 to 1892. Other parties were named defendants in the bill, but no process was issued against them, and no other defendant appeared.

As found by the court below:

"This suit is not brought upon any statute of Kentucky; but, like Briggs *v.* Spaulding (141 U. S., 132), is founded upon the common law liability for misfeasance and negligence in the performance by the testator of his duties as a director and president of the corporation about withdrawing and allowing the withdrawal of these moneys from the corporation."

At the close of the hearing the complainant claimed that the estate of B. D. Harris was liable as follows:

"1. For the sum of $75,000 as a joint and several liability of the directors and officers of the company, with interest thereon from January 11, 1890, the first date shown by the record that the $75,000 had been taken from the company.

"2. For $45,000 as a several liability as stockholder, on account of the issue to himself, without consideration, on January 11, 1888, of one hundred and fifty shares or $15,000 of stock, and on April 22, 1889, three hundred shares or $30,000 of stock, to be accounted for $15,000 as of January 11, 1888, and $30,000 as of April 22, 1889.

"3. For the damages suffered by the company by reason of the issue to the other stockholders of the Great Western Mining and Manufacturing Company by B. D. Harris and the other officers and directors of the company on January 18, 1888, of three hundred and fifty shares or $35,000 of stock, and on April 22, 1889, of seven hundred shares or $70,000 of stock without consideration, to determine which said damages and injury a reference should be had to a master.

"4. For the dividends wrongfully paid out of capital stock
235 between April, 1889 and July, 1892, as a joint and several liability of the directors and officers of the company so pay-

ing said dividends, and for the dividends paid B. D. Harris individually, as a several liability of his estate."

As to these claims the court below finds as follows:

"All claims except as to the issues of $50,000 of stock in 1888, and of $100,000 of stock in 1889, and the $75,000 received by the stockholders from the bond and stock transaction have, on the argument, been waived."

Thus it appears that, while the action is bottomed on a common law right and, as to the claims insisted on in the court below, is for money damages only, the bill is in form one for equitable relief.

The opinion of the court below accurately and succinctly states the facts concerning these transactions, as follows:

"The Great Western Mining and Manufacturing Company was a corporation of Kentucky, with a capital stock of $200,000, in shares of $100 each, of which the defendant's testator, a citizen of Vermont, held 600, and a brother of the testator 600,—bought in 1883, at $30 per share,—another person 440, another 300, another 52, and two others 4 each. The five largest stockholders were the directors, and the testator was the president. It had lands, mines and transportation facilities in Kentucky, and largely produced and sold coal. It issued $50,000 of new stock ratably to the stockholders in January, 1888, and it owed $131,585.03 December 31, 1888. Negotiations for placing $300,000 of mortgage bonds had been going on, and offers had been made for the sale of them at 60 per cent., without finding purchasers. A proposition was made by brokers to the directors, April 18, 1889, for putting them on sale at 85 per cent, with a bonus of half as much stock as of bonds.

"At the annual meeting April 22nd,

'The attention of the stockholders being called to the large amount of net earnings being used for construction and bet-
236 terments, the following resolution was presented, and, after consideration, was adopted, to wit:

'*Whereas*, There have been expended for permanent improvements and betterments, including machinery, barges, flats, etc., during the years 1884, 1885, 1886, 1887 and 1888, more than $160,000.00, all of which sum has been furnished from the net earnings of the company and fairly belong to the stockholders of the company,

'*Therefore, resolved*, That the directors of this company be, and hereby are, authorized and requested to direct the president and secretary of the company to issue one thousand shares of the capital stock of the company, to be divided *pro rata* among the present stockholders of this company, as follows:

'To B. D. Harris	300 shares
G. D. Harris	300 shares
John Carlisle	220 shares
G. W. Carlisle	150 shares
George S. Richardson	26 shares
James C. Holden	2 shares
L. Hinsdale	2 shares

'The matter of negotiating a loan for the benefit of the company was also taken up, and a resolution authorizing the loan to the amount of $300,000, for which bonds were to be issued, was approved.'

"On the same day the directors voted:

'That the president and secretary of the company shall arrange for the sale of the $300,000 bonds aforesaid, in their discretion, at the best price obtainable, and the proceeds thereof shall be applied to the cancellation and retirement of $60,000 first mortgage 7 per cent. bonds, dated January 1, 1884, now outstanding, also to the payment of all floating indebtedness incurred up to the date hereof for material and construction, and the balance shall be used by the directors for the best interests of the company.'

237 "They also passed the following resolutions:

'*Whereas*, At the annual meeting of the stockholders of this company a resolution was adopted requesting the directors to issue additional capital stock of this company to the amount of $100,000.00, to be divided *pro rata* among the present stockholders, and based upon the fact that during the last five years more than $160,000.00 of the net earnings of the company have been expended for permanent improvements and betterments, thereby adding that amount to the assets of the company which belong to the stockholders of the company;

'*Therefore, resolved*, That the president and secretary of this company are hereby directed to issue one thousand shares of the capital stock of the company to the present stockholders in proportion to the amount of stock already owned by them, respectively.'

"A transaction took place among the stockholders as such and the directors as such, as shown by the following extracts from the records of the company:

'*Proposition of Stockholders of the Great Western Mining and Manufacturing Company to the Directors of said Company.*

'*Whereas*, The directors of the Great Western Mining and Manufacturing Company have taken steps to borrow the sum of $300,000, to be used in payment of existing indebtedness of the company and to provide additional working capital, etc., and have authorized the president and secretary to execute bonds for said amount, and to negotiate the same at the best price obtainable; and

'*Whereas*, We are informed that it will probably be possible to find purchasers for said bonds at the price of eighty-five per cent. of the par value thereof, provided that stock of the company, to the extent of fifty per cent. of the par value of the said bonds shall also be transferred to the several purchasers of said bonds; and

'*Whereas*, It is deemed to be inexpedient to issue any new
238 stock of the company for such purpose, and desiring to do all we can to assist the directors in procuring said loan and the sale of said bonds:

'We therefore make this proposition to the directors of the company in reference to the sale of stock held by us in said company, to the purchasers of said bonds, to wit:

'We will sell to the several purchasers of said bonds of the company stock of the company belonging to us in the amounts set opposite our names, respectively, and will furnish to the secretary of the company certificates of said stock, assigned in blank, to be by him delivered to said purchasers of said bonds, upon the understanding and agreement that we are to receive the sum of $50 for each share of stock so sold by us out of the money paid for said bonds, and said secretary shall act as our agent in receiving said amounts, and shall pay us the same before the company shall be entitled to have the remainder of the money paid for said bonds by the purchasers thereof.

'This action is not to be construed as a proposition to sell said stock to the company, but it is to be treated and regarded as a sale of stock directly to the purchasers of said bonds, to be paid for by them to us, and the payment by them to the secretary of this company for said bonds shall be regarded as a payment to us for said stock to the extent necessary to pay us therefor upon the terms above stated.

'In testimony whereof, we have hereunto set our hands, on this third day of May, 1889.

'B. D. HARRIS	450 shares
G. D. HARRIS	450 shares
JOHN CARLISLE	336 shares
GEO. S. RICHARDSON	39 shares
G. W. CARLISLE	225 shares
Total	1,500 shares

239 'After full consideration of the proposition, the same was accepted, and the secretary was authorized to act as the agent for said stockholders in the proposed sale of their stock and the collection of the purchase money therefor, and directed to turn over the net proceeds of the sale of bonds into the treasury of the company.'

"A mortgage was made, and $300,000 of bonds bearing 6 per cent. semi-annual interest were issued, dated June 1, 1889, and sold in several various amounts, with half as much stock transferred in blank, and deposited ratably by the stockholders with the treasurer, who delivered it with the bonds to the takers of them respectively. The stock of the testator was transferred at various times between September 7, 1887, and March 7, 1890. Of the money received by the treasurer for the bonds and stock, 25 per cent., being 50 per cent. of the stock, was paid by the treasurer to the several stockholders furnishing the stock. The testator furnished 450 shares of the stock, and received $22,500 of the proceeds of the bonds and

stock in that manner; all the stockholders received $75,000; and the corporation retained $180,000. The avails of the loan, $255,000, were entered as such on the books of the corporation, and the $75,000 paid to the stockholders was entered as an expense of the loan. The $22,500 was sent to and received by the testator, and this bond transaction was closed in 1890. The business of the corporation was continued, debts were created, dividends were declared and paid to those holding the stock that went with the bonds, but none to the testator upon his original stock after January 1, 1891; and interest coupons from the bonds were paid till 1892, when the receiver was appointed, on a creditor's bill, by the circuit court of the United States for the district of Kentucky. The mortgage was foreclosed by intervention in that suit, and the property covered by the mortgage was sold for $70,000, and the other property for $5,666.67. The avails of the mortgaged property, after deducting expenses, were applied on the mortgage debt, leaving the remainder thereof amounting to more than the face of the
240 bonds still due. The other debts amounted to $122,221.32."

The reasoning of the court, upon which it reached its conclusion, is as follows:

"The substance of the plaintiff's claim is for the withdrawal of the money received for the mortgage bonds, and not for the increases of stock, and the question of solvency would refer to the situation at the time of the withdrawal. The prior debts had then been, or soon were, paid, but the mortgage bonds were outstanding, and the avails of them were what paid the prior debts. They were debts of the corporation, and in view of the whole situation as shown by the evidence they amounted to as much at least as the corporation could at most pay, and the depletion of any part of the $75,000 that came from the corporation would be more than it could spare. The increases of stock were far within the limits of the power of the corporation, and these issues of it ratably to the stockholders would in themselves work no harm. The stockholders would, as between themselves, own the corporate property in the same proportions as before. Outsiders would not be affected till reached. Then they would be entitled to stand upon their rights to protect themselves. The first increase of stock was made more than a year before there appears to have been any suggestion of using stock to effect a loan, and to have been entirely separate from the bond transaction. When made, and ratably divided, it would not of itself affect at all the stockholders as between themselves or outsiders. If sold to others, whether it was valuable or not, or at a fair or unfair price, the corporation would not be pecuniarily affected If it brought 25 cents of the 85 cents on the dollar of the face of the bonds that the stock and bonds brought, that part would belong to the stockholder furnishing the stock, and not to the corporation; and the receiving of that by the stockholders would not be depleting the assets of the corporation. The bonds would not float at 60. The bonds and stock would at 85.

The inference follows that the bonds brought 60 and
241 the stock 25. The stockholders and directors agreed to this among themselves each with the others, and that would confirm the division, for, although directors may not contract away to any of themselves more than to others the property of the corporation to the detriment of creditors, they are not precluded from dealing fairly with any of their number in respect to what is his own. This deal may not have been fair to the takers of the bonds and stock for want of value to the stock, but the point here is whether there was a fair division between the corporation and the stockholders of the avails of the transaction as it was, fair or unfair, according to the proportion of the consideration furnished by each. The amount received for this issue of stock, in this view, was $25,000, of which the defendant's testator received $7,500 as the price of the stock furnished by him that did not come from the last issue, but had been divided to and become his before any negotiation of the bonds as well as any of his prior stock had. The last issue of stock was concurrent with the issue and negotiation of the bonds and stock, and that stock moved as much from the corporation to the new bondholders as if it had been issued directly to them, instead of through the prior stockholders to the bondholders. Neither the statement in the vote of this stock that it was based upon the expenditure of net earnings for permanent improvements, nor the provision in the proposal of the stockholders that the secretary should act as their agent in transferring the stock and receiving the money, nor the protest that the action should not be construed as a sale of the stock to the company, but should be regarded as a sale to the purchasers of the bonds, could alter the nature of the transaction, or its source or its place, as a part of the consideration for the money received from the bondholders. The whole moved from the corporation, and the transaction wrought a depletion of assets of the corporation needed to make the bonds good, and to which the bondholders were entitled, if necessary, for the payment or security of the bonds. There was no agreement between the stockholders
242 and the bondholders as to the price of the stock, nor otherwise except among the stockholders themselves. As to the bondholders, according to the evidence, it was a mere bonus to float the bonds. The stockholders receiving the money took it with the risk of its being required to make the bonds good. It is so required, and the plaintiff, as receiver, represents the rights of the bondholders as creditors in respect to it. Briggs *v.* Spaulding (141 U. S., 132.) The avails of this increase were $50,000, of which the testator received $15,000." Great Western Mining and Manfg. Co. *v.* Harris' Estate (111 Fed., 38).

The court, thereupon, held that the testator's estate was liable for the amount of fifteen thousand dollars received by the testator through the last issue of stock. The court reached this conclusion upon the theory that the stock issue of 1899 was in so far a part of the bond transaction that the legal effect was the same as though

the stock had been issued directly by the corporation to the purchasers, and that, therefore, to that extent, said issue operated as a withdrawal of the assets of the corporation. But, this arrangement was made, in fact as well as in form, by the stockholders for the sale not of the capital stock of the corporation but of the capital stock issued to and owned by them, respectively, as a method of disposing of the bonds. It would seem that inasmuch as before said stock issue the stockholders owned the entire equity in the assets of the corporation and all received their proportionate shares of said additional stock, that the only reduction in value was the reduction in value of the shares previously owned by them. As is said by counsel for defendant in his brief,

"After the issue they (the stockholders) owned the same thing. They gained nothing and the corporation parted with nothing by the issue of additional stock. It merely placed in the hands of the stockholders an instrument whereby they could conveniently detract from the value of the shares of stock which they formerly held, in order to vest new and equal rights in the persons to whom
243 they might transfer the new shares. Whatever of value passed to the purchasers of those shares was withdrawn, not from the assets of the company, but from the antecedent equity or interest which was vested in the stockholders making the sale. Taking the stock transaction by itself, it did not affect the company in any way. It merely diminished the relative interest in the corporation of those stockholders who engaged in it."

The People *ex rel.* The Union Trust Company *v.* Michael Coleman (126 N. Y., 433).

But, irrespective of these considerations, the controlling question herein is as to the right of the receiver to bring this suit. The Kentucky court, in the exercise of its general equity powers, appointed him receiver of the property and assets of said corporation to hold and keep its property, and directed him to institute suit for the advantage of said company in his own name as receiver or in the name of the company.

In Hale *v.* Allinson (188 U. S., 56, 68), Mr. Justice Peckham, referring to Booth *v.* Clark (17 How. 322), says:

"It was there held that an ordinary receiver could not sue in a foreign jurisdiction, and an elaborate examination was made by Mr. Justice Wayne of the principles upon which the decision was founded. In speaking of the right of a receiver, appointed under a creditors' bill in New York, to bring an action in a foreign State, it was said, in the course of the opinion, as to such receiver, 'whether appointed as this receiver was, under the statute of New York, or under the rules and practice of chancery as they may be, his official relations to the court are the same. A statute appointment neither enlarges nor diminishes the limitation upon his action. His responsibilities are unaltered. Under either kind of appointment, he has at most only a passive capacity in the most important part of

what it may be necessary for him to do, until it has been called by the direction of the court into ability to act. He has no extra-territorial power of official action; none which the court appoint-
244 ing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek.' This statement has not been overruled or explained away by any subsequent decision of this court to which our attention has been called." See also Evans *v.* Nellis (187 U. S., 271); Finney *v.* Guy (189 U. S., 335).

The order appointing the receiver herein did not, in terms, authorize him to institute suits in a foreign jurisdiction. Had it done so, his position would be like that of the receiver in Hilliker *v.* Hale (117 Fed., 220), where this court said:

"He was made an arm of the court, with which the court attempted to reach outside its territorial jurisdiction; and the attempt, it seems to us, was futile. The court could not reach beyond the limits of its jurisdiction, through a receiver, any more than it could through a marshal or a sheriff."

It is clear, therefore, that this receiver cannot maintain this suit in this court as receiver. But it is urged that, irrespective of his right to sue as receiver in a foreign jurisdiction, he may maintain such suit in the name of the corporation.

The preliminary question before us is not as to the right of the corporation to bring a suit in its own name, within or without the State of Kentucky. In Glenn *v.* Marbury (145 U. S., 499, 511), the Supreme Court said:

"As this corporation, notwithstanding it may have ceased the prosecution of the objects for which it was organized, could still proceed in the collection of debts, the enforcement of liabilities, and the application of its assets to the payment of its creditors, all corporate powers essential to those ends remained unimpaired."
245 The question before the court in that case was the technical one as to whether an assignee of a chose in action should sue in his own name or in that of the assignor, and the court held that under the common law prevailing in the District of Columbia said trustee could not maintain an action at law in his own name for a call or assessment of stock, but that such suit could have been maintained by him in the name of the company. The court states the rule to be

"That a demand upon the stockholder to meet a call or assessment, by competent authority, must be enforced in the name of the person or corporation holding the legal title to the stock subscription, and to whom the promise of the stockholder was made."

There the company had assigned by deed to trustees, for whom

this plaintiff had been substituted, all its estate, including moneys payable, "whether on calls or assessments on the stock of the company" or otherwise, and the court had confirmed said deed and entered an order for a call and assessment, and authorized said trustee to bring suit to collect said calls. The court, therefore, in accordance with the rule laid down in Booth *v.* Clark, *supra*, and Relfe *v.* Rundle (103 U. S., 222), held that the trustee, being vested with title by the voluntary act of the corporation itself, by virtue of said assignment and the orders of the court pursuant thereto, was entitled to institute such suit in its name.

In Hilliker *v.* Hale, *supra*, this court considered the distinction between a receiver or trustee vested with a title which may be asserted anywhere and one who, as in this case, is a mere agent or officer of the court. Referring to the status of the receiver therein, we said as follows:

"We are further of the opinion that the plaintiff cannot maintain this action. He sues as receiver. His rights, if any, rest wholly upon the order and decree in the Rogers case. Without regard to the nature of the claim asserted against the defendant,
the plaintiff has no relation to that claim otherwise than
246 through such order and decree. He is not the assignee of all
or any of the creditors. He has no title to anything, so far as appears, except to his office as receiver. The order and decree, in terms, make him a mere agent of the Minnesota court. That court undertook to authorize him to sue non-residents in other jurisdictions; moneys collected to be 'held by him subject to the further order of this court (the Minnesota court) in the premises.' The Minnesota court thus attempted to send its agent to collect money by suit outside of its jurisdiction, and bring it back to be disposed of as it might direct. If it had had power to transfer the claim against the defendant to the plaintiff, and had in fact so transferred it, he could assert the title thus acquired and sue upon such claim here in accordance with the principles stated in Association *v.* Rundle (103 U. S., 222). Apparently the court had no such power. Whether it had or not, it did not attempt to exercise it. It transferred nothing to the plaintiff. It merely appointed him its own agent to collect and hold subject to its order."

We think these considerations apply with equal force to the right of the receiver to maintain this suit in the name of the corporation. It does not appear that it has exercised its corporate powers so as to vest any title in the receiver or otherwise to authorize him to sue in its name. In the absence of such proof the presumption is that he is acting without such authority. The sole authority shown by the bill is alleged as follows:

"That in proceedings in the United States circuit court for the district of Kentucky, L. C. Black, of Cincinnati, State of Ohio, was appointed receiver of the assets of your orator for the purpose of realizing upon the same for the benefit of its creditors, and by special order of said United States circuit court for the district of

Kentucky, he has been directed to prosecute this suit either in his own name or the name of your orator, as may be proper."

But if said court cannot send such an agent outside of its territorial limits to collect moneys as receiver, its attempt to exer-
247 cise extra territorial powers by directing such agent to proceed in the name of the corporation must be equally futile except where the court by statute or otherwise is empowered to vest title in the receiver or where the corporation or the court acting within its powers on behalf of the corporation or as the successor of its officers has authorized such act. Hilliker *v.* Hale, *supra*; Great Western Telegraph Co. *v.* Purdy (162 U. S., 329.)

But even if it be assumed that this receiver, by thus bringing suit in the name of this corporation by himself as receiver, can maintain an action on its behalf which he could not maintain as receiver only, it is not clear how this assumption would help the complainant corporation. It is, in any event, bound by the rules of law regulating the relations of a corporation to its officers, and, between it and its stockholders and directors, by its contract and the acts done in pursuance thereof.

A creditor, on the other hand, may by appropriate legal proceedings avail himself of every existing legal right against the corporate officers or stockholders. A contract between a corporation and its stockholders that they should not be called on to pay therefor in full is good between the corporation and its stockholders. The creditor defrauded by such a transaction may have such contract set aside. Scovill *v.* Thayer (105 U. S. 143); Clark *v.* Bever, (139 U. S. 96, 111), and cases cited.

"An agreement that the subscribers or holders of stock shall never be called upon to pay for the same may be good as against the corporation itself, it has been uniformly held by this court not to be binding upon its creditors." Handley *v.* Stutz (139 U. S. 417, 428).

Evans *v.* Nellis, *supra*.

So, too, a receiver, if duly authorized to institute such a suit, is the representative of all parties interested therein. He is appointed in behalf of all parties who may establish rights in the cause.
248 Booth *v.* Clark, *supra*. He may, as the representative of creditors, disaffirm acts of the corporation, and sue to set aside transactions entered into in fraud of their rights. *In re* The Wilcox & Howe Company (70 Conn., 220).

It may be that the acts and misrepresentations of Carlisle, the manager of said corporation, or of the brokers through whom the bond transaction was carried out, were in fraud of persons who became creditors upon the strength of said representations, and that an appropriate suit may be brought by such creditors to recover therefor. But this right is one existing, not in favor of all creditors of a corporation, but in favor of a particular class of creditors only, namely, those creditors who were defrauded by said transaction.

Handley v. Stutz (139 U. S., 417); Coit v. Gold Amalgamating Co. (119 U. S., 343); Cook on Corporations, 5th ed., sections 42 and 46.

This suit cannot be treated as one brought to annul the contract whereby said transaction was carried out by creditors who may have been defrauded thereby. Neither the bill filed in the Kentucky court nor the bill herein charges that any purchaser of bonds or stocks was deceived by said action of the corporation, and there is no evidence to that effect.

The complainant is bound by the allegations of the bill and the contention on which it is based that this is a suit only in the right of the corporation independent of its creditors and to which neither the receiver nor the creditors are parties. We are of the opinion that such a suit cannot be maintained by this corporation.

In Handley v. Stutz, *supra*, the bill was filed by certain judgment creditors against a Kentucky corporation for a stock assessment against certain creditors, in circumstances similar to those in the case at bar.

Referring to the claims of the bondholders who were to receive a certain amount of stock as bonus, the court holds that such transactions can only be impeached for fraud and that only subsequent creditors who were entitled to enforce their claims against these stockholders and trusted the company upon the faith of said increase of stock, could enforce their claims against such stockholders
249 and that no such equity exists in favor of creditors whose debts were contracted prior to such authorization.

So, in Coit v. Gold Amalgamating Co., *supra*, in a suit by a judgment creditor to enforce an alleged personal liability of the stockholders for fraud in issuance of unpaid stock, Mr. Justice Field, speaking for the court, said:

"The plaintiff had placed no reliance upon the supposed paid-up capital of the company on the increased shares, and, therefore, has no cause of complaint by reason of their subsequent recall. Had a new indebtedness been created by the company after the issue of the stock and before its recall, a different question would have arisen. The creditor in that case, relying on the faith of the stock being fully paid, might have insisted upon its full payment. But no such new indebtedness was created, and we think, therefore, that the stockholders cannot be called upon, at the suit of the plaintiff, to pay in the amount of the stock, which, though issued, was soon afterwards recalled and cancelled."

It would seem that, inasmuch as it was agreed as part of the contract between the corporation and its stockholders that the stock should be deemed full paid, the stockholder could not be held liable in a suit by the corporation wherein it seeks to annul its contract as a fraud upon the general creditors of the corporation. The language of Mr. Justice Peckham in Hale v. Allinson, *supra*, referring to a contract of subscription, is illustrative of the relation of the parties. The court says:

"Assuming the contractural character of the subscription to the

stock of the corporation, the right of the receiver to maintain this suit is not thereby made plainer. The contract may have been to pay, in the event of its insolvency, to the creditors of the corporation the amount for which the shareholder might be liable up to the par value of his stock. That was a contract in behalf of the creditor, with which the corporation had nothing to do, and the
250 statute did not make this liability assets of the corporation or confer upon any receiver appointed in the case the right to proceed to enforce it."

We have, then, in this case, a suit brought in the name of a corporation wherein it seeks to repudiate, on the ground of fraud, certain contracts made by it with its officers and stockholders, which, so far as the record shows, was lawful in its inception. Whether it could in any case disaffirm its contract and seek to recover the fruits thereof without restoring the parties to their original status, it is not material to inquire. Scovill *v.* Thayer, *supra*. It is clear that it is not the proper party to maintain this suit.

The corporation was a party to the contract whereby it was agreed that no payment should be required upon said issues of stock. The evidence shows that the bonds could not be floated without a stock bonus, and, there being no stock in the treasury of the company, the stockholders contracted with said company to sell to the bond purchasers directly their own stock *pro rata*, in order to provide such bonus. It may be noted in this connection that there is some evidence tending to show that the officers of the company made this contract in good faith, believing it to be for the benefit of the company. So far as this defendant's testator is concerned, while there are some expressions in his letters which are capable of being interpreted as evidence of an intent to secure a benefit to himself as stockholder at the expense of the corporation, yet the evidence taken as a whole falls far short of proving that he was a party to any unlawful scheme or believed that the plan which was adopted for floating the bonds and selling his stock to the purchasers of bonds was either actively or constructively fraudulent.

In Foster *v.* Seymour (23 Fed., 65), Judge Wallace, upon a demurrer to a bill, had occasion to consider a claim made by a stockholder against a corporation and its trustees to require the latter to account to the corporation for a disposition of its capital stock alleged to have been fraudulent. The allegations of the bill presented a state of facts quite similar to those established by the evi-
251 dence herein, so far as the issue of capital stock and its sale to the public operated as a fraud upon the public and future purchasers of the stock. He says:

"The transaction as alleged was a fraud upon the public. It was equivalent to an over issue of stock by a corporation to its stockholders. It was calculated to lead parties, dealing with the corporation in ignorance of the facts, to believe that it had a paid-up capital stock of $10,000,000, and representing a corporate fund of that amount invested in mining property. By putting out the scrip,

the trustees represented to the public, who have no means of knowing of the private contracts made between a corporation and its stockholders, that the capital stock had been subscribed for and paid in. It was not a fraud upon the stockholders, however, because there were none; nor necessarily upon persons subsequently becoming stockholders, because the stock was full-paid stock, and not liable to any further calls in the hands of those who might purchase it. Scovill *v.* Thayer (105 U. S., 143). A purchaser of the stock would not be injured by the transaction unless he paid more for it than it was worth; and every purchaser would stand upon the particular circumstances of his purchase. If the original transaction, in connection with the special facts of a purchase of stock, should operate as a fraud upon a purchaser, the cause of action would be his, and not that of the corporation. The fraudulent character of the transaction was imparted to it by the corporation itself; that is, by those who represented all there was of the corporation. The remedy of the complainant, if he has been deceived into the purchase of stock by false representations as to its value, is against those who have misled him. Even if he could recover against the corporation or against the trustees (see Fosdick *v.* Sturges (1 Biss., 255), the corporation has no cause of action against the trustees."

See also Flagler Engraving Machine Co., *v.* Flagler (19 Fed., 468, 470).

252 We have thus fully discussed the point because the brief of complainant's counsel asserts that, even if the stock had had some value, "the transaction would, nevertheless, have been a fraud upon the prospective bondholders and stockholders whom they were inducing to enter the company," and further contends that the prospective bondholders and purchasers were led by resolutions, representations and reports of the officers of the company to believe that the money which they were about to pay for the bonds and stock would, after payment of the debts, be devoted to the interests of the company and the improvement of the plant.

In stating these conclusions we do not wish to be understood as holding that the transactions complained of may not have been grossly fraudulent, to the prejudice of certain creditors of the corporation; nor do we question the doctrine that the assets of an insolvent corporation are impressed with a trust for the payment of its debts and cannot be withdrawn by the stockholders without providing for such debts, as held by the court below.

Assuming the facts found by the court below, we think the receiver has misconceived his right and acted beyond the scope of his authority in thus bringing this suit in the name of the corporation.

The bill further alleges that the defendant Harris

"permitted and directed him (Carlisle) to pay dividends on all of the shares of stock in said company, except those standing in the names of said John Carlisle and George W. Carlisle, his brother, and accordingly, such dividends were paid by said John Carlisle to sundry

persons, but the names of said persons and the amount paid to each of them are to your orator unknown."

The claim that the estate of B. D. Harris is liable therefor appears to have been abandoned in the court below. The admission and contention of the receiver in this court is stated in his brief as follows:

253 "For the amount that B. D. Harris actually received, his estate should be made to account. For what he paid others the action has probably abated."

The bill does not charge that Carlisle paid any dividends to Harris between 1889 and 1892. It is admitted that no dividends were received by Harris after January 1, 1891. Even if dividends were received by him between 1889 and 1891, a question as to which the evidence is indefinite, such dividends were paid at a time when the company was a going concern and without any open present evidence of insolvency. Furthermore, it is not alleged nor shown that Harris knew that such dividends, if paid, were not paid out of the earnings of said corporation, or that he did not receive them in perfect good faith.

The date of insolvency alleged in the bill was 1892, and it appears that in 1889 all outstanding debts had been paid. In these circumstances, the estate of B. D. Harris is not liable in this suit by the corporation. McDonald *v.* Williams (174 U. S., 397); New Hampshire Savings Bank *v.* Richie (121 Fed., 956).

The decree of the circuit court that the complainant is entitled to the sum of fifteen thousand dollars is reversed with costs, and the cause remanded to said court with instructions to dismiss the bill with costs.

Harlan Cleveland, for the complainant.
Brainerd Tolles, for the defendants.

254 At a stated term of the United States circuit court of appeals, in and for the second circuit, held at the court rooms in the post office building in the city of New York, on the 28th day of December one thousand nine hundred and three.

Present: Hon. E. Henry Lacombe, Hon. William K. Townsend, Hon. Alfred C. Coxe, circuit judges.

GREAT WESTERN MINING AND MANUFACTURING COMPANY, by L. C. Black, Receiver, Complainant-Appellant,
vs.
CHARLES A. HARRIS ET AL., as Executors, etc., Defendants-Appellants.

Appeals from the circuit court of the United States for the district of Vermont.

This cause came on to be heard on the transcript of record from the circuit court of the United States, for the district of Vermont, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said circuit court be and it hereby is reversed with costs to the defendants, and cause remanded with instructions to dismiss the bill with costs.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

W. K. T.

255 Endorsed: United States circuit court of appeals, second circuit. Great Western Mining & Manfg. Co. *vs.* Chas. A. Harris. Order for mandate. United States circuit court of appeals second circuit. Filed Jan. 6, 1904. William Parkin, clerk.

256 UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 311 and 1 to 256 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Great Western Mining & Manfg. Company, against Charles A. Harris, *et al.* as the same remain of record and on file in my office, and of the exhibits produced and used on the argument of the appeal.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 29th day of February in the year of our Lord one thousand nine hundred and four and of the Independence of the said United States the one hundred and twenty-eighth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

257 To the honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made, having been lately certified and filed in the office of the honorable the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed, and under direction of counsel for the petitioner, said stipulation is hereby certified as the return to the writ of certiorari issued herein.

Dated New York, April 29th, 1904.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

258 UNITED STATES OF AMERICA, *ss*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which The Great Western Mining and Manufacturing Company by L. C. Black, its receiver, is appellant, and Charles A. Harris, Henry D. Hollister, and Sarah B. Harris, as executors of the last will and testament of B. D. Harris, deceased, are appellees, on appeal and cross-appeal, which suit was removed into the said circuit court of appeals by virtue of appeals from the circuit court of the United States for the district of Vermont, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and
259 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twelfth day of April, in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

260 [Endorsed:] File No. 19,283. Supreme Court of the United States. No. 632, October term, 1903. The Great Western Mining & Manufg. Co., by L. C. Black, receiver, *vs.* Charles A. Harris *et al.*, executors &c. Writ of certiorari. United States circuit court of appeals second circuit. Filed Apr. 29 1904 William Parkin, clerk.

261 United States Circuit Court of Appeals, Second Circuit.

THE GREAT WESTERN MINING AND MANUFACTURING Company, by L. C. Black, Receiver, Complainant-Appellant,
vs.
CHARLES A. HARRIS ET AL., as Executors, etc., Defendants-Appellants.
} No. 12. Stipulation.

The Supreme Court of the United States, in the above entitled cause, having on the 11th day of April, 1904, granted a writ of certiorari to the United States circuit court of appeals for the second circuit in said cause,

It is hereby stipulated between the parties that the certified transcript of the record filed in the office of the clerk of the Supreme Court of the United States on the petition for said writ of certiorari may be taken as a return to said writ of certiorari, and that a certified copy of this stipulation may be sent up by the clerk of this court with his return to said writ.

HARLAN CLEVELAND,
Solicitor for the Great West. Min. & Mfg. Co., etc.
DAVIES, STONE & AUERBACH,
Solicitors for Charles A. Harris et al., Executors, etc.
JULIAN T. DAVIES.
BRAINARD TOLLES.

262 [Endorsed:] United States circuit court of appeals, second circuit. Great Western Mining & Mfg. Co. *v.* Chas. A. Harris *et al.* as executors. Return to certiorari.

263 [Endorsed:] File No. 19,283. Supreme Court U.S. October term, 1904. Term No. 217. Great Western Mining & Manfg. Co. petitioner *vs.* Chas. A. Harris *et al.* executors &c. *et al.* Writ of certiorari and return. Filed May 4", 1904.

Supreme Court of the United States.

OCTOBER TERM, 1903.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY, by L. C. Black, Receiver,
Petitioner,

No.———. *vs.*

CHARLES A. HARRIS et al, Executors, etc., et al,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Supreme Court of the United States:

The petitioner respectfully prays for a writ of *certiorari* to review the decree of the United States Circuit Court of Appeals for the Second Circuit, and annexes hereto a statement of the case and its grounds for petition. It files printed copies of the record in the Circuit Court of Appeals and a certified copy of the transcript of the proceedings in that court.

Horace Cleveland

of Counsel for the Petitioner.

STATEMENT OF THE CASE.

(1) WHAT THE CIRCUIT COURT OF APPEALS DECIDED.

The Circuit Court of Appeals for the Second Circuit decided in this case:

1st. That the United States Circuit Court for the District of Vermont had no jurisdiction of a suit brought *in the name of the Great Western Mining & Mfg. Co., a Kentucky corporation,* by the receiver of that company against a citizen of Vermont under the direction of the United States Circuit Court for the District of Kentucky; and,

2d. That, even if the court had jurisdiction of the suit, no cause of action was vested in the corporation to recover $75,000 of funds of the company, which the directors and officers had secretly and fraudulently abstracted, but that such cause of action was vested in the creditors, or the receiver as representing the creditors.

(2) THE SUIT.

The suit was brought in the name of the Great Western Mining & Mfg. Co., by L. C. Black, its receiver, in the United States Circuit Court for the District of Vermont at the direction of the United States Circuit Court for the District of Kentucky, by which court the receiver was appointed, September, 1892, in a general creditors' and foreclosure suit. (Rec., 263, 264; Exs. 107-A, 108, 109, pp. 198, 199.)

The suit was against B. D. Harris, formerly the president and a director and one of the largest stockholders of the company. It was sought by the bill to charge him as a director and officer of the company, for the fraudulent misappropriation of $75,000 of its funds to his own use and that of his co-directors, and also for other acts of malfeasance and negligence. (Rec., 4-8.)

The Great Western Mining & Mfg. Co. was a corporation organized under the laws of the state of Kentucky. Its authorized capital was $3,000,000. Prior to 1888 and 1889 only $200,000 had been issued, owned as follows:

B. D. Harris, [president and director].....600 shares.
G. D. Harris, [director].....600 shares.
John Carlisle, [secretary, treasurer and director]....440 shares.

George W. Carlisle, [director] ..... 300 shares.
Geo. W. Richardson, [vice-president and director] .. 52 shares.
Jas. C. Holden, [director] ..... 4 shares.
Loring Hinsdale, [director] ..... 4 shares.

Total ..... 2,000 shares.
(Exhibit, pp. 106, 118, 165.)

From 1883 till 1889 these gentlemen had filled these positions, and had operated the company, whose business was the mining of coal. By 1888 it was hopelessly in debt to the amount of $131,000.00. For this debt the Harrises and Carlisles were responsible by endorsement, and otherwise, to the extent of $120,000.00 (Ex. 2; Ex. 98, p. 97; Rec. 102, 103).

In this desperate condition of the company the idea was conceived by them in 1888 of making a loan of $300,000.00 by issuing bonds in that amount secured by mortgage. Negotiations were entered into for this purpose ,which lasted from some time in 1888 until the spring of 1889. Finally, through John Carlisle, of Cincinnati, O., the secretary and treasurer, an agreement was effected with Elliott, Johnson & Co., of Wilmington, Del., the terms of which were never formally embodied in any written instrument, but which are shown in the following correspondence.

(3) THE AGREEMENT.

(John Carlisle to B. D. Harris):

"April 1, 1889.

"I think now is the time to offer additional inducements either *in giving* stock or a guarantee to the one who subscribes the first $25,000. (Ex. 98, p. 88.)

(John Carlisle to B. D. Harris):

"CINCINNATI, April 13, 1889.

"In my hurried letter yesterday I do not know that I made matters plain. It is this: Messrs. Elliott, Johnson & Co. about one year since placed with the aid of Fisk, Hatch & Co., of New York, the bonds of the Shawnee Coal Co. of this city, who are mining two thousand tons per day. *The bonds were sold at a discount, but were sugared with an even amount of stock, dollar for dollar. They were confident if we would agree to this that they alone could float the loan. That would mean doubling our stock to which I strongly objected. At last I agreed subject to your approval to increase the capital stock to* $350,000.00 *or* $400,000.00 *and give* $150.000.00 *of stock with the bonds.*" (Ex. 98, p. 88.)

(Elliott, Johnson & Co. to John Carlisle):

"WILMINGTON, Del., April 18, 1889.

"MR. JOHN CARLISLE,
Cincinnati, Ohio.

"DEAR SIR: Your favor of the 16th received. We wrote you yesterday, which will cover what you request, but now restate that our plan is to undertake to float your bonds, provided the further examinations legal and engineering are favorable, without assuming any responsibility, *so that the bonds with 50 per cent. of the Great Western Mining & Mfg. Co.'s capital stock, as a bonus, will net you 85 per cent.* • • •

"Yours truly,
ELLIOTT, JOHNSON & CO."

(Ex. 16, p. 36.)

(John Carlisle, Sec'y., etc., to Elliott, Johnson & Co.):

"APRIL, 27 1889.

"MESSRS. ELLIOTT, JOHNSON & CO.,
Wilmington, Del.

"GENTLEMEN: At the meeting of the directors of the Great Western Mining & Mfg. Co., held on the 22d inst., your proposition, embodied in your letter of the 18th inst., undertaking to float the bonds of this company, so that *the same should net the company eighty-five per cent. of the par value thereof, providing fifty per cent. of the par value of the bonds in the stock of the company should also be transferred with said bonds;* and also provided that the results of further examination are favorable, was presented and accepted, and the secretary was directed to notify you of such action of the directors.

"This gives you the exclusive authority to negotiate the sale of the bonds of the company.

"Very truly yours,
"JOHN CARLISLE, Sec., etc."

(Ex. 79, p. 67.)

(B. D. Harris to John Carlisle):

"BRATTLEBORO, Vt., June 3, 1889.

"JOHN CARLISLE, ESQ.,

"DEAR SIR: • • • It was no part of our original plans with Elliott & Co. that we should engage in this business, and did not enter at all in our arrangement with them. *Our plan was to sell* $300,000.00 *bonds with a bonus of* $150,000.00, *stock outright, etc., for the net sum of* $255,000.00, *and not to buy at all.* • • •

"Very truly yours,
"B. D. HARRIS."

(Ex. 98, pp. 96, 97.)

(4) THE FRAUD.

As stated in Carlisle's letter to Elliott, Johnson & Co., the meetings of the above named stockholders and directors of the company were held on April 22, 1889. At the meeting of the stockholders the loan of $300,000.00 was authorized. The capital stock was also increased to $350,000, *but instead of directing that the increase should be issued to the purchasers of the bonds as bonus stock,* as agreed, the stockholders and directors proceeded to work a scheme to fraudulently misappropriate $75,000.00 of the loan. They had been contemplating such a course for some time.

August 11, 1888, John Carlisle had written to B. D. Harris, relative to the bond issue.

"Mr. Tyler is of the opinion the words '*necessary expenses and outlays*' will cover as he expresses it '*a multitude of sins*' *and enable us to use the money received from sale of bonds, that is, what is left over and above paying the debts and working capital*" (R. 185).

On August 16, 1888, he had written to G. D. Harris, the brother of B. D. Harris, a letter intended for both, in which apropos of the use of funds derived from the sale of the bonds he had said:

"*After all this is done I think there will be left sufficient to divide that will almost refund to us what our stock cost us,* $70,000." (R. 186, 189, 192, 195, 196, 199, 204.)

And B. D. Harris in a letter to John Carlisle, April 27, 1889, referred to the matter as "our one chance." (Ex. 98, p. 90.)

The resolution of stockholders, passed April 22, 1889, to carry out the scheme of fraud was this:

"The attention of the stockholders being called to the large amount of net earnings being used for construction and betterments, the following resolution was presented, and, after consideration, was adopted, to-wit:

"WHEREAS, There has been expended for permanent improvements and betterments, including machinery, barges, flats, etc., during the years 1884, 1885, 1886, 1887 and 1888, more than $160,000.00, all of which sum has been furnished from the net earnings of the company and fairly belongs to the stockholders of the company.

"THEREFORE, RESOLVED, That the directors of this company be and hereby are authorized and requested to direct the Presi-

dent and Secretary of the company to issue one thousand shares of the capital stock of the company to be divided pro rata among the present stockholders of this company as follows:

To B. D. Harris	300 shares.
G. D. Harris	300 shares.
John Carlisle	220 shares.
G. W. Carlisle	150 shares.
George S. Richardson	26 shares.
James C. Holden	2 shares.
L. Hinsdale	2 shares.

(Rec. 152; Ex. 13, p. 12; Ex. 106, p. 177.)

These same stockholders and directors had in January, 1888, about the time the issue of bonds was first contemplated, issued to themselves $50,000,000 of stock in the same way, upon the pretense that $64,666.44 had gone into betterments during 1885, 1886 and 1887. (Rec. 151, Ex. 10, p. 10; Ex. 106, p. 172.)

On the same day, April 22, 1889, the directors, pursuant to the authority granted them at the stockholders' meeting, passed the following resolution:

"ASHLAND, Ky., Apr. 22, 1889.

"A meeting of the newly elected directors of the Great Western Mining & Manufacturing Company was held this day, immediately after the adjournment of the stockholders' meeting.

* * * * * * * * *

"The following preamble and resolutions were presented, and, after full consideration, were unanimously adopted, to-wit:

"'Whereas, The Great Western Mining & Manufacturing Company of Kentucky has power under its charter to borrow money and issue bonds therefor, and secure payment of the same by the mortgage of all or part of the property of the company; and

"'Whereas, At a meeting of the stockholders of the said company, held on the 22d day of April, A. D. 1889, the directors were authorized and requested to negotiate a loan of three hundred thousand dollars ($300,000), and to issue bonds therefor, and to execute a deed of trust or mortgage to secure payment thereof, on all the property of said company; and

"'Whereas, It is desirable to more thoroughly develop and to largly increase the output of the mines at Peach Orchard, and such development can not be secured without additional capital for the opening of new mines, for the purchase of additional machinery and working plant, and for the increase of terminal facilities; therefore

"'(1) RESOLVED, That this company will issue three hundred (300) mortgage bonds of the denomination of one thou-

sand dollars ($1,000) each, to mature in twenty (20) years from June 1, 1889, and to bear interest at the rate of six per cent. per annum, payable semi-annually, etc., etc.

" '(2) RESOLVED, That the payment of the three hundred bonds aforesaid as they respectively mature, and of the interest as it semiannually becomes due and payable, shall be secured by a first mortgage or deed of trust, conveying to the Mercantile Trust and Deposit Company of Baltimore, Md., all the property, real, personal and mixed, of the Great Western Mining & Manufacturing Company, etc., etc.

" '(3) RESOLVED, That said deed of trust shall provide for the creation of a sinking fund in 1894, etc., etc.

" '(4) RESOLVED, That the said deed of trust shall provide especially against the creation of any further mortgage debt, etc., etc.

" '(5) RESOLVED, That the preparation of the bond and deed of trust, in conformity with the foregoing resolutions, shall be entrusted to John Carlisle, and that the same, when duly approved by B. D. Harris, President, shall be executed, etc., etc.

" '(6) RESOLVED, That the president and secretary of the company shall arrange for the sale of the three hundred (300) bonds aforesaid, in their discretion, at the best price obtainable, *and the proceeds thereof shall be applied* to the cancellation and retirement of sixty (60) first mortgage seven per cent. bonds, dated Jan. 1, 1884, now outstanding; also to the payment of all floating indebtedness incurred up to the date thereof, for material and construction, and the balance shall be used by the directors for the best material interests of the company.' " (Ex. 14, p. 16; Ex. 106, p. 178-180.)

This resolution had been submitted to Elliott, Johnson & Co. by John Carlisle April 15, 1889 (Ex. 72, p. 64), and returned by Elliott, Johnson & Co. to John Carlisle April 17, 1889, in a letter in which they had stated that *"also other resolutions should be passed covering the issuance of stock and the fifty per cent. bonus."* (Ex. 18, p. 36.)

The directors at the same meeting, April 22, 1889, passed also this resolution:

"WHEREAS, at the annual meeting of the stockholders of this company, a resolution was adopted requesting the directors to issue additional capital stock of this company to the amount

of $100,000.00 to be divided pro rata among the present stockholders and *based upon the fact* that during the last five years more than $160,000.00 of the net earnings of the company have been expended for permanent improvements and betterments, thereby adding that amount to the assets of the company which belong to the stockholders of the company.

"THEREFORE, RESOLVED, That the president and secretary of this company are hereby directed to issue one thousand shares of the capital stock of the company to the present stockholders in proportion to the amount of stock already owned by them respectively, and that they furnish certificates of such stock as follows:

To B. D. Harris	300 shares.
G. D. Harris	300 shares.
John Carlisle	220 shares.
G. W. Carlisle	150 shares.
Geo. S. Richardson	26 shares.
James C. Holden	2 shares.
Loring Hinsdale	2 shares.

(Ex. 14, p. 16; Ex. 106, p. 178-180; Rec., 151, 152, 164, 165).

The only word Elliott, Johnson & Co. got of these resolutions of the directors dividing capital stock among themselves was this statement in a letter from John Carlisle:

(John Carlisle to Elliott, Johnson & Co., April 27, 1889). (Ex. 80, p. 67.)

"MESSRS. ELLIOTT, JOHNSON & CO.,
Wilmington, Del.

"GENTLEMEN: * * * I enclose herewith an official formal acceptance of your proposition.

"At our meeting of the 22d inst. we increased the capital stock to $350,000." * * *

"Yours truly,
"JOHN CARLISLE."

The recitals supposed to justify the distribution of this stock among these directors and officers as stockholders were absolutely false and known by them to be false. No net earnings had gone into betterments at any time between 1883 and 1889. The history of the financial condition of this company between those years (Ex. 2, p. 1-8) *prepared by John Carlisle for the information of the stockholders, and directors at these very meetings* as Carlisle reluctantly admitted, shows this fact beyond question. (Ex. 2, pp. 1-8; Rec. 101-114; Opinion of Wheeler, J., Rec. 280.)

On April 27, 1889, the very day Carlisle sent the formal acceptance of the company to the proposition of Elliott, Johnson & Co., to float the bonds with fifty per cent. of the stock as a bonus so that the same should net the company eighty-five cents of the par value thereof, and told them the capital stock had been increased for that purpose, he wrote this letter to B. D. Harris, the defendant in this case.

(John Carlisle to B. D. Harris):

"APRIL 27, 1889.

"I have yours of the 24th. I enclose letter received to-day from Elliott, Johnson & Co. with a copy of my formal acceptance of their proposition. I believe they can do much better, if not hampered with conditions.

"I also enclose a proposition of the stockholders *which Mr. Tyler carefully prepared so that we could legally take the* $75,000.00." (Ex. 98, p. 90.)

The proposition of the stockholders, which was enclosed, is as follows:

"Proposition of Stockholders of The Great Western Mining & Manufacturing Company to the Directors of Said Company.

"WHEREAS, the Directors of the Great Western Mining & Manufacturing Company have taken steps to borrow the sum of $300,000.00 to be used in payment of existing indebtedness of the company and to *provide additional working capital, etc.*, and have authorized the President and Secretary to execute bonds for said amount, and to negotiate the same at the best price obtainable;

"AND WHEREAS, *we are informed* that it will probably be possible to find purchasers for said bonds at the price of eighty-five per cent. of the par value thereof, provided that stock of the company, to the extent of fifty per cent. of the par value of the said bonds, shall also be transferred to the several purchasers of said bonds;

"AND WHEREAS, it is *deemed to be inexpedient to issue any new stock of the company for such purpose;* and *desiring to do all we can to assist the directors in procuring said loan and the sale of said bonds:*

"WE THEREFORE make this proposition to the directors of the company in reference *to the sale of stock held by us* in said company, *to the purchasers of the said bonds*, to-wit:

"We will sell to the several purchasers of said bonds of the company, stock of the company belonging to us, in the amounts set opposite to our names respectively, and will furnish to the secretary of the company certificates of said stock, as-

signed in blank, to be by him delivered to said purchasers of said bonds, upon the understanding and agreement, that we are to receive the sum of $50.00 for each share of stock so sold by us, out of the money paid for said bonds and said secretary shall act as our agent in receiving said amounts, and shall pay us the same, before the company shall be entitled to have the remainder of the money *paid for said bonds* by the puchasers thereof.

This action is not to be construed as a proposition to sell said stock to the company, but *it is to be treated and regarded as a sale of stock directly to the purchasers of said bonds, to be paid for by them to us, and the payment by them to the secretary of this company, for said bonds, shall be regarded as a payment to us for said stock, to the extent necessary to pay us therefor upon the terms above stated.*

"In Testimony Whereof we have hereunto set our hands, on this third day of May, 1889.

B. D. Harris	450 shares.
G. D. Harris	450 shares.
John Carlisle	336 shares.
Geo. S. Richardson	39 shares.
G. W. Carlisle	225 shares.
Total	1,500 shares."

It was signed by all the then stockholders, except Hinsdale and Holden, submitted to *themselves* as directors on May 13, 1889, long after the contract to sell the bonds *with the bonus of stock* so as to net the company eighty-five cents on the dollar had been made (Ex. 93, p. 96; Ex. 106, pp. 181, 182).

It is needless to say that it was not communicated to Elliott, Johnson & Co. Neither they nor any purchaser of bonds and bonus stock, although the Circuit Court of Appeals in its opinion suggests that no one was deceived, knew of it until 1894, when L. C. Black, the receiver, discovered it from the books and records of the company. (Rec. 165, 29-36; Ex. 108, p. 196.) This evidence is uncontradicted.

(5) THE RESULT.

Elliott, Johnson & Co. proceeded in good faith to dispose of the bonds with the bonus of stock, according to their contract, to divers persons. As they sold the bonds they remitted to the company for 85 per cent. of the face value thereof, beginning June 3, 1889, and gave the names of the purchasers to whom the supposed bonus stock at the rate of fifty cents of stock

for every dollar of bonds sold should be issued by the company. (Ex. 41, 42, 43, 31, 32, 33, 36, 37, 40, 46, 47, 49, 50, 55, 61, 62, pp. 50, 51, 44, 47, 46, 48, 49, 52-56, 59.)

John Carlisle, who was secretary and treasurer of the company at Cincinnati, upon receipt of their letters surrendered stock of his own or of his brother and issued new certificates in the names of the purchasers and forwarded them to Elliott, Johnson & Co. Later the matter was equalized by the Harrises and Richardson surrendering their quota of stock to Carlisle. (Rec. 193, 195; Ex. 15, p. 17.)

Long after these new stockholders had thus been brought into the company, Carlisle as treasurer of the company paid out of the proceeds of the bonds remitted to him, in accordance with the secret plan of the stockholders and directors of April and May, 1889, the $75,000.00 as follows:

B. D. Harris	$22,500.00
G. D. Harris	22,500.00
John Carlisle	16,800.00
G. W. Carlisle	11,250.00
Geo. S. Richardson	1,950.00
	$75,000.00

(Rec. 173, 193, 194.)

The result of the transaction as shown by the books of the company under date of April 1, 1890, is as follows:

Dr.	
Proceeds of sale of bonds at 85 cents	$255,000.00
Accrued interest	891.25
	$255,891.25

Cr.	
Bond expense—Prof. Weatherby and fee	$ 350.00
Bond expense—Mercantile Trust Co.	300.00
Bond expense—H. B. Huey, attorney	100.00
Bond expense—notary	4.00
Bond expense—registering bonds	60.00
Bond expense—lithographing	196.00
Bond expense—blue print maps	10.00
Bond expense—E. Vernon, drawing papers, etc.	480.00
Bond expense—printing	20.00
Bond expense—R. Tyler, attorney	250.00
Bond expense—telegrams	5.00

Bond expense—traveling expenses.....	500.00
Bond expense—Harris, Carlisle et al, stockholders	75,000.00
Firt mortgage bonds.....	60,000.00
John Carlisle, balance due Jan. 1, 1889, and int. 1 year	5,416.37
John Carlisle, treasurer, balance due Jan. 1, 1889, and int. 1 year.....	21,156.57
John Carlisle, 1st note.....	12,720.00
John Carlisle, 2d note.....	12,000.00
John Carlisle, 3d note.....	12,771.96
John Carlisle, 4th note.....	7,000.00
John Carlisle, interest on said notes....	3,392.61
John Carlisle, commissions.....	8,779.50
Total	$220,603.01
Balance left	$ 35,288.24

(Rec. 168, 172; Exs. 94. 95, 96, pp. 77, 85.)

That was all that was left out of $255,891.25, after paying the expenses of issuing the bonds, the $75,000.00 misappropriated by the directors and the debts of the company.

This balance of $35,288.24 was credited to "Treasurer's Account" and charged to "John Carlisle, Treasurer" Account, March 31, 1890, in two items of $30,000.00 and $5,228.24, respectively. It was afterwards used to pay dividends and interest

September, 1892, a receiver was appointed. Claims were filed and allowed by the United States Circuit Court for the District of Kentucky as follows:

Unsecured floating debt .....$	96,650.91
Bonded indebtedness with interest.....	318,675.00
	$415,325.91

The entire assets of the company sold for the following:

Mines, real estate, improvements.....	70,000.00
Goods in store	5,666.67
Total realized	$75,666.67

This entire indebtedness accumulated between 1889 and the failure of the company in September, 1892. (Rec. 219; Ex. 107-A, p. 195; Ex. 110, pp. 199, 210; Ex. 111, pp. 210 to 220; Ex. 112, p. 220 to 222; Ex. 113, pp. 223, 230.)

Up to the failure of the company, in September, 1892, and thereafter, B. D. Harris, his brother G. D. Harris, John Carlisle, his brother Geo. W. Carlisle, Geo. S. Richardson, Loring Hinsdale and James C. Holden, who had, with the exception of Holden, perpetrated this fraud, continued to be the sole directors and officers of the company in charge of its affairs, as they had been from 1883 to 1889.

(6) THE HOLDINGS OF THE COURTS BELOW.

The Circuit Court for the District of Vermont found that the estate of B. D. Harris, he having meanwhile died, was liable to account for $15,000.00 being the amount abstracted by Harris from the company in exchange for the three hundred shares of stock issued to himself in April, 1889, at the time the loan was floated; but held that his estate was not liable for the remainder of the $22,500.00, or $7,500.00 taken by him in exchange for stock issued to him in January, 1888, before the negotiations for the loan were concluded; and also held that his estate was not liable to account for the remainder of the $52,500.00 taken by the other officers and directors and stockholders with his connivance and consent. The court seemed to think that had the Harrises and Carlisles legitimately owned the stock, the transaction would have been perfectly regular, whereas had the stock been really their own, it would have been equally a fraud on the company to have applied it to such a use with such a purpose.

On cross appeals to the United States Circuit Court of Appeals for the Second Circuit, the appeal of the Harris estate was allowed, and the decree of the court below reversed with instructions to dismiss the bill on two grounds:

1st. That the United States Circuit Court for the District of Vermont had no jurisdiction of the suit brought in the name of the Great Western Mining & Mfg. Co. by its receiver;

2d. That even if the court had jurisdiction, the suit could not be maintained either by the corporation or in the name of the corporation by the receiver, because all the stockholders interested in the company at the time of the distribution of stock in April, 1889, and the sale thereof at fifty cents on the dollar under the proposition to the directors of May 3, 1889,

had assented thereto except Holden, who only owned a few shares.

I.

THE JURISDICTION OF THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF VERMONT.

The Circuit Court of Appeals for the Second Circuit upon the question of jurisdiction cited the following cases:

Booth v. *Clark* 17 How., 322.
Hale v. *Allison*, 188 U. S., 56.
Evans v. *Nellis*, 187 U. S., 271.
Fennick v. *Guy*, 189 U. S., 335.
Heilliker v. *Hale*, 117 Fed., 220.

These cases simply decide that a receiver appointed by the court of one state could not maintain a suit in a court of another state, *in his own name*, to recover assets of a corporation or to enforce the double liability of stockholders.

Without any other reason than the reasons behind those cases, the Circuit Court of Appeals for the Second Circuit said:

"We think these considerations apply with equal force to the right of the receiver to maintain its suit *in the name of the corporation.* * * * But if said court can not send such an agent outside of its territorial limits to collect moneys as receiver, its attempt to exercise extra territorial powers, by directing such agent to proceed in the name of the corporation, must be equally futile except where the court by statute, or otherwise, is empowered to vest title in the receiver, or where the corporation or the court acting *within the powers on behalf of the corporation, or as the successor of its officers, has authorized such act.*".

Why the court in collecting the assets of a corporation is not acting within its powers, on behalf of the corporation, or as the successor of the officers of the corporation in suing in its name, is not explained. It certainly authorized the suit (Ex. 107*a*, 108, 109, pp. 198-199). It also most certainly did the same thing in principle as was done in *Great Western Telegraph Co.* v. *Purdy*, 162 U. S., 329, where the court made a call on stockholders to pay an assessment and directed the receiver to sue for it in the name of the corporation.

The court distinguished *Glenn* v. *Marbery*, 145 U. S., 499, in which Glenn, a trustee of a Virginia corporation, had brought

a suit *in his own name* in the District of Columbia to recover from Marbery an amount due on a call for subscriptions of stock made by the court, and where this court had said,

(Page 511): "There is no reason why the trustee, Glenn, could not have sued in the name of the company" on the ground that the title to the assets of the corporation vested in Glenn as successor of trustees named by the corporation.

It failed to give any weight to the fact that in *Great Western Telegraph Company* v. *Purdy*, 162 U. S., 329, a receiver appointed by the Circuit Court of Cook County, Illinois, brought an action *in the name* of the Great Western Telegraph Company, a corporation of Illinois, by himself as receiver, against Purdy, a citizen of Iowa, to recover a sum alleged to be due from him to the company under his subscription to its stock; and that the jurisdiction of the District Court of Des Moines, Iowa, where the suit was brought, was not called in question either in the state courts or in this court.

For some reason it ignored utterly the case of *Hayward* v. *Leeson*, 176 Mass., 310, *a case where the question has been fairly raised and decided.*

In that case the receiver of the East Tennessee Land Company appointed in a creditor's action by the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee, on the authority of that court instituted an action in the courts of Massachusetts *in his own name* to recover from directors and promoters secret profits made by them without full disclosure of the fact to the future stockholders about to be taken into the company. The Supreme Court of Massachusetts, while holding that the receiver could not bring the suit in his own name, said,

(Page 324): "The last objection made by the defendants is the plaintiff, as receiver, can not bring the suit in his own name; and we think that this objection is well taken. * * * The plaintiff, as receiver, by virtue of these orders, has the powers usually conferred by a court of equity upon a receiver to preserve property pending litigation and nothing more * * *."

(Page 326): "*Upon substituting the East Tennessee Land Company as plaintiff in place of John K. Hayward*" (the receiver), "the causes are to stand for hearing as to what the net profits are, which the defendants have respectively received,

or as to what the damages are, which the plaintiff has suffered, as the plaintiff shall elect to proceed for the property or its proceeds on the one hand, or for damages on the other hand." [Italics ours.]

This last case is not only an authority upon the question of jurisdiction but also upon the other questions involved.

Upon the vexed question of the right of a receiver to sue even in his own name out of the jurisdiction under the rule of comity it is not intended to enter.

Howarth v. *Angle*, 162 N. Y., 179.
Howarth v. *Lombard*, 175 Mass., 570.
Howarth v. *Elwanger*, 86 Fed., 54.
Holmes v. *Kirtley*, 107 Fed., 1, 9.
Lewis v. *Amer. Naval Stores Co.*, 119 Fed., 396.

However that may be, he can in collecting the assets, bring a suit *in the name of the corporation* under the authority of the court.

The contrary doctrine, as announced by the Circuit Court of Appeals for the Second Circuit, means that in every case where a receiver of a corporation is appointed having debts outside of the jurisdiction, ancillary proceedings for the appointment of a receiver will have to be brought in every State where there may be funds or property or claims of the corporation, in order to enable a suit to be brought; especially where, as in this case, the board of directors of the corporation at the time of the insolvency are themselves debtors of the corporation, and hostile to the receivership.

It is an important question involving the administration of the affairs of the majority of corporations which go into the hands of receivers. It should, we submit, be passed upon by this court.

II.

THE RIGHT OF ACTION TO RECOVER ON THE ONE HAND PROPERTY OF A CORPORATION, OR ITS PROCEEDS WHICH HAVE BEEN MISAPPROPRIATED BY OFFICERS OR ON THE OTHER HAND DAMAGES FOR ITS MISAPPROPRIATION, IS IN THE CORPORATION AND NOT IN ITS CREDITORS OR ANY ONE ELSE.

This proposition has been settled by this court.

Van Weel v. *Winston*, 115 U. S., 228, 245, 247.

Porter v. *Sabin*, 149 U. S., 473, 478.

This was not primarily a suit against B. D. Harris as a stockholder to recover $22,500.00 par value of stock which was issued to him as fully paid up, when he paid no consideration therefor. Such a cause of action, apart from the stock having been secretly distributed just before other stockholders were about to be taken in, as all the then stockholders, except Holden, assented, may be in the creditors.

Handley v. *Stutz*, 139 U. S., 417, 426-428.

Camden v. *Stuart*, 144 U. S., 104, 113-115.

It is not a suit brought on behalf of the bondholders and stockholders for fraudulent misrepresentation as to the value of the bonds or shares taken by them. Such right of action, we agree with the United States Circuit Court of Appeals, would only lie in favor of the creditors to whom the misrepresentations were made.

It is not strictly a suit against *stockholders as such* to annul the alleged contract made by them with themselves as directors under date of May 3, 1889, and to recover the consideration paid thereunder by which they in form pretended to sell stock to the purchasers of the bonds, but in reality turned it over to the corporation to issue to the purchasers of bonds as bonus treasury stock. If it were, it may be that the stock would have to be tendered back by the corporation.

It is a suit against a director and the president of the company, having in charge its funds, to ~~without consideration~~ charge him with $75,000.00, proceeds of a loan to and assets of the corporation, or what is the same thing, damages in that amount for taking the $75,000.00, which came into his hands and under

his control as an officer and director of the company, and which he, as charged in the bill, conspired with his co-directors to fraudulently appropriate to the extent of $22,500.00 to his own use and to the extent of $52,500.00 to the use of his co-officers and co-directors; and to consummate such fraud, adopted the plan, as charged in the bill, of issuing to himself and his co-directors $150,000.00 of stock without consideration, and of turning it back to the corporation at fifty cents on the dollar, under the pretense of enabling it to carry out its contract to sell $300,000.00 of bonds with $150,000.00 of treasury stock as a bonus at eighty-five cents on the dollar.

If the contract of May 3, 1889, between the stockholders and the directors be treated as anything more than a form, to help accomplish the abstraction of $75,000.00 it is maintainable as a suit to recover damages from a *director* for fraud in the sale of his and his co-directors' worthless stock to the corporation, which had $2,750,000 of the same worthless stock still in its treasury, to the damage of the corporation as representing all interested in it. The suggestion that the contract of May 3, 1889, was between the stockholders and purchasers is utterly untenable. It is not so in form. It is with the directors. It is not so in fact. The directors were not agents of the purchasers and had no such authority.

Yet the Circuit Court of Appeals for the Second Circuit seemed to entirely overlook and utterly misapprehend the nature of the action. It says:

"But even if it be assumed that this receiver, by thus bringing suit in the name of this corporation by himself as receiver, can maintain an action on its behalf which he could not maintain as receiver only, it is not clear how this assumption would help the plaintiff corporation. It is, in any event, bound by the rules of law regulating the relations of a corporation to its officers, and, between it and its stockholders and directors, by its contract and the acts done in pursuance thereof.

"A creditor, on the other hand, may by appropriate legal proceedings avail himself of every existing legal right against the corporate officers or stockholders. A contract between a corporation and its stockholders, that they should not be called on to pay therefor in full, is good between the corporation and its stockholders. The creditor defrauded by such a transaction may have such contract set aside. * * * So, too, a receiver, if duly authorized to institute such a suit is a representative of

all parties interested therein. He is appointed in behalf of all parties who may establish rights in the cause. (*Booth* v. *Clark, supra*).

"He may, as a representative of creditors, disaffirm acts of the corporation, and sue to set aside transactions entered into in fraud of their rights. * * *

"The complainant is bound by the allegations of the bill and the contention on which it is based, that this is a suit only in the right of the corporation independent of its creditors, and to which neither the receiver nor the creditors are parties. We are of the opinion that such a suit can not be maintained by this corporation. * * *

"It would seem that inasmuch as it was agreed as part of the contract between the corporation and its stockholders that the stock should be deemed fully paid the stockholder could not be held liable in a suit by the corporation wherein it seeks to annul its contract as a fraud upon the general creditors of the corporation. * * * We have then, in this case, a suit brought in the name of a corporation, wherein it seeks to repudiate, on the ground of fraud, certain contracts made by it with its officers and stockholders, which, so far as the record shows, was lawful in its inception. Whether it could in any case thus disaffirm its contract and seek to recover the fruits thereof without restoring the parties to their original status, it is not material to inquire. (*Scoville* v. *Thayer, supra.*)

"It is clear that it is not the proper party to maintain this suit.

"The corporation was a party to the contract whereby it was agreed that no payment should be required upon said issues of stock. The evidence shows that the bonds could not be floated without a stock bonus, and, there being no stock in the treasury of the company" (*sic*) "the stockholders contracted with said company to sell to the bondholders directly their own stock, pro rata, in order to provide such bonus. * * *

"In stating these conclusions we do not wish to be understood as holding that the transactions complained of may not have been grossly fraudulent, to the prejudice of certain creditors of the corporation; nor do we question the doctrine that the assets of an insolvent corporation are impressed with a trust for the payment of its debts and can not be withdrawn by the stockholders without providing for such debts, as held by the court below. Assuming the facts found by the court below, we think the receiver has misconceived his right and acted beyond the scope of his authority in thus bringing this suit in the name of the corporation."

In support of these propositions the Circuit Court of Appeals cites the well known cases of:

Scoville v. *Thayer*, 105 U. S., 143.
Clark v. *Bever*, 139 U. S., 96, 111.
Evans v. *Nellis*, 187 U. S., 271.
Handley v. *Stutz*, 139 U. S., 417.
Coit v. *Gold Amal. Co.*, 119 U. S., 343.
Hale v. *Allison*, 188 U. S., 56.

These cases have no application to the taking of the $75,000.

(1) *Scoville* v. *Thayer*, 105 U. S., 143, decides that there is no obligation on the part of the stockholders as between them and the company, where an agreement has been made by the company that no further assessments should be made, to pay for the residue of their stock, unless it became necessary to satisfy creditors, and that, therefore, the statute of limitations did not run until the necessity for the payment had been ascertained and an authorized demand of payment made.

(2) *Clark* v. *Bever*, 139 U. S., 96, decides that a corporation in good faith may pay its indebtedness, or sell or dispose of its stock in payment of debts to its creditors at less than par.

(3) *Evans* v. *Nellis*, 187 U. S., 271, decides that under the statutes of Kansas as interpreted by the Supreme Court of that state, only the receiver can bring an action against the corporation to collect the statutory liability of stockholders for the benefit of all creditors in an action against the corporation and all the resident stockholders, and, therefore, such receiver could not maintain an action in a Circuit Court of the United States against an individual stockholder for the amount of the statutory liability.

(4) *Handley* v. *Stutz*, 139 U. S., 417, decides that a stockholder who receives a gratuitous distribution of stock as fully paid, incurs an obligation to pay for it in full, when called upon to do so by creditors whose debts are subsequent to the increase; but that this equity does not exist in favor of a creditor whose debt was contracted prior to such authorization; and further that a corporation in good faith may give stock as a bonus with and in order to sell its bonds.

(5) *Coit* v. *Gold Amal. Co.*, 119 U. S., 343, decides that where shareholders honestly and in good faith pay for their subscription in property in place of money, third persons can not

complain; but where there is a gross and obvious overvaluation of property conveyed in consideration of an issue of stock, there is strong evidence of fraud in an action against a stockholder by a creditor to enforce personal liability for his debt.

(6) *Hale* v. *Allison*, 188 U. S., 56, decides that a receiver can not collect the double liability in a foreign jurisdiction under the laws of Minnesota; and also that the liability was one in favor of creditors, with which the corporation had nothing to do; and that the statute did not make the liability assets of the corporation, or confer upon any receiver appointed in a case the right to enforce it, especially without the jurisdiction of the court.

What have these cases to do with the case made by the bill and proof? This suit, as to the $75,000 taken, was not one against stockholders to recover unpaid subscriptions to stock or the value of stock which the stockholders in the Great Western Mining & Mfg. Co. issued to themselves; but was a suit to charge B. D. Harris because he, with others, was a director and officer of the Great Western Mining & Mfg. Co.; because as such director and officer he stood in a fiduciary relation to the corporation; and by reason thereof could not take a remuneration for stock, which as a director he had agreed to issue as bonus stock to effect a sale of bonds by secretly issuing the stock to himself and turning it back to the corporation at fifty cents on the dollar to supply to purchasers of bonds.

In other words, the company having agreed to sell bonds at eighty-five cents on the dollar with a bonus of stock, the directors and officers of this company could not, pending such negotiations and after the same were closed by contract, secretly issue to themselves as stockholders the amount of stock so agreed by the corporation to be given as a bonus and then secretly as stockholders go through the form of selling it to themselves as directors to enable the company to supply bonus stock to the purchasers of the bonds, though the company had $2,750,000 treasury stock on hand, and thereby take $75,000 of the proceeds of the sale of the bonds from the treasury of the company. They could not even have sold the stock which they legitimately owned in this way, much less that which they took in order to use in this illegitimate way.

Such a transaction was a fraud on the corporation. It was taking the money of the corporation. The money when paid

in by the bondholders for their bonds and bonus stock became the money of the corporation and general assets to be used for all purposes of the corporation (*Van Weel* v. *Winston*, 115 U. S., 228, 245). It did not continue to be the money of the bondholders who paid it. They, it is true, were defrauded both as bondholders and stockholders, because the assets of the corporation were depleted and so has every other creditor and stockholder of the corporation been defrauded for the same reason. But the $75,000 taken, if recovered, does not belong to any special class of creditors, but would be general assets of the corporation.

The directors and officers, at the time they made the contract with Elliott, Johnson & Co., to float the bonds at eighty-five cents on the dollar with a bonus of fifty cents of stock for every dollar of bonds stood in a fiduciary relation not only to themselves as the sole stockholders and the existing creditors of the company, but also to all the subsequent stockholders whom they contemplated bringing in, the purchasers of the bonds, and the future creditors of the company. They were much more than promoters, in reference to whom the rule as to secret profits and full disclosure is so strict. They were directors and officers of an existing corporation and *promoters* of a new loan and issue of bonus stock. Contrary to what the Circuit Court of Appeals said the company had an authorized capital stock of $3,000,000. It had only issued prior to 1889 $250,000. It had $2,750,000 of treasury stock on hand. It had a perfect right, if it were necessary to enable it to float its bonds, to increase its capital stock to any amount up to $3,000,000 and to issue the stock as fully paid as a bonus to enable it to float its bonds at eighty-five cents on the dollar.

Handley v. *Stutz*, 139 U. S., 417, 420, 435.
Dickerman v. *Trust Co.*, 176 U. S., 202.

This it agreed with Elliott, Johnson & Co. to do by increasing the stock to $350,000 or $400,000. But instead of doing so, these directors and officers "secretly and, therefore, dishonestly," as said in *Re Olympia, Ltd.*, L. R. (1898), 20 Chan., 153, same case *Gluckstein* v. *Barnes*, L. R. (1900), App. Ca., 240, issued to themselves $100,000 of the stock, and then turned it with $50,000 of stock they had issued to themselves in 1888 back to the company at fifty cents on the dollar and under this guise secretly took $75,000 from the treasury of the company.

III.

THE AUTHORITIES.

The cases relied upon by the petitioner are not mentioned in the opinion of the United States Circuit Court of Appeals. It may be we are wholly mistaken in their application, but we submit that they are precisely in point and analogous to the case at bar. One of them is the same sort of a case as this. They hold, not only that such a proceeding as the one complained of in this suit is a fraud, whether honestly or dishonestly intended, but *also that the right of action is in the corporation* as representing all interested in the company whether then actually in or intended to be brought in.

(1) *London Trust Co., Ltd.*, v. *Mackenzie*, 68 Law Times Rep., 380, is this case.

The directors of a company entered into an agreement with a firm of contractors to do certain work for the company for a specified sum in debentures and fully paid shares of the company and also made, secretly, certain contemporaneous agreements with the contractors to make over to third parties, without consideration, a certain portion of these debentures and shares. *Each of the shareholders and debentureholders who were in the company when this agreement was made* took a benefit under one or other of the contemporaneous agreements and *all agreed* to such disposition of the *debentures and shares*. The court said,

(Page 384): "The plaintiffs in substance claim a declaration that the defendants are liable to make good to the company the amounts of these appropriations as being in effect a giving away of capital of the company and beyond the powers of the directors.

"The more substantial defenses are two. First, it is said that the arrangement was one to which every one who had an interest either as a shareholder or debentureholder or creditor agreed, that no one was wronged or defrauded and that under the circumstances the case of *Re The Gold Mining Co.*, 11 Ch. Div. 701; *Re The Ambrose Lake Tin & Copper Co.*, 14 Ch. Div. 390, and *Re The British Seamless Paper Box Co.*, 17 Ch. Div. 467, apply and neither the company nor the plaintiff's shareholders could complain.

"But those were all cases of persons who owned the entire capital of the company *and intended to remain the sole pro-*

prietors, and they were held free to make honest agreements among themselves as to the appropriation of their property, whereas in he present case there was to be a large issue of shares to the contractors which it must have been intended that the public should take up, and there remained a large part of the share capital to be alloted in the future, and the parties to the present agreements were taking for themselves thirty thousand pounds of the company to the detriment of all who might take any such shares, and they were doing so secretly and were misrepresenting by the prospectus and registered deed the real nature of the transaction.

"It seems to me *the company is entitled to protect the future shareholders and its own funds against such appropriation* and that the very cases relied on by the defendants are authorities for this view. 'If,' said James, L. J., in the last cited case, 'they were intending although then constituting the whole company that other people should come in afterwards to whom what had been done would be injurious the court would feel no difficulty in saying as Lord Langdale did in *The Society of Practical Knowledge* v. *Abbott,* 2 Beav., 559, that they intended to commit a fraud.' "

And again,

(Page 385): "Mr. Masterman drew a distinction which does not appear to be tenable. It was *qua* shareholder not *qua* director, he said, that he stipulated for the bonus as a condition of giving his consent. But as director he gave a profit to himself as shareholder and the director must account for it. * * *

Objections were raised to the right of the plaintiffs to maintain this action. .So far as the company is concerned it is for the reasons already given entitled to sue in the interest of those who hold the shares issued to the contractors or to be issued to the public." (Italics ours.)

(2) *Hayward* v. *Leeson,* 176 Mass., p. 310, covers all the points raised by the defense in this case. In that case directors of a corporation, who, before any capital stock had been issued to the public, caused to be issued to themselves, as a remuneration for their services as promoters and for options on land, by the vote of all persons who then had any interest in the corporation, one-third of the whole capital stock and then invited subscriptions to the stock without disclosing that fact, were held:

(*a*) Guilty of a fraud;

(*b*) Liable in a suit in equity (which should in a foreign jurisdiction be brought in the name of the corporation and not

in that of the receiver) to account for the net profits received by them; or damages suffered by the company;

(*c*) At the option of the company as it chose to follow the shares or the proceeds thereof or to recover damages;

(*d*) And had no right to demand that the company tender back the lands acquired by it under the options transferred in exchange for the stock.

The court said—in answer to the contentions; that the stock issued was lawfully issued for interest in lands and for services rendered or to be rendered; that there was no fraudulent overvaluation in the issue of the $700,000 shares of stock; that the issue of the stock was voted for by the defendants and others as stockholders, and that stockholders are under no fiduciary relation to anybody and can do as they will with their own; and moreover that it was consented to by all the stockholders of the East Tennessee Land Company, and, consequently, could not then be made the basis of any complaint by the corporation or anybody else;

(Page 318) "Moreover, it is not sought in these suits, to charge the defendants because they voted as stockholders to issue the $700,000 of stock; but it is sought to charge each defendant because he, with others, was a promoter of the East Tennessee Land Company; because as a promoter he stood in a fiduciary relation to the future shareholders of that corporation, and by reason thereof he could not receive any remuneration for his services as a promoter of that corporation without making a full disclosure thereof, and obtaining the consent of those shareholders thereto." (Citing cases) * * *

(Page 320): " * * * The person to whom the promoters owe the duty which they owe by reason of their fiduciary relation are the persons who put their money into the enterprise at the invitation of the promoters, that is to say, the future stockholders. It is to the future stockholders that the promoters must make the disclosure of the remuneration which is, or is to be, paid to them, and it is the consent of the future stockholders that must be obtained to make that payment valid; if the promoters undertake to make to themselves remuneration for their services as promoters without making a full disclosure of the fact to the future stockholders, their principals, and getting their consent, they are guilty of a fraud."

(Page 326): "Upon substituting the East Tennessee Land Company as plaintiff in place of John K. Hayward, the causes are to stand for hearing as to what the net profits are, which the defendants have respectively received, or as to what the

damages are, which the plaintiff has suffered, as the plaintiff shall elect to proceed for the property or its proceeds on the one hand, or for damages on the other hand."

(3) The case of *Re The British Seamless Paper Box Co.*, 17 Ch. Div. 467, was one in which all the owners of shares in the company had allotted to themselves a large amount of stock without consideration. The company afterwards failed and the attempt was made to hold the stockholders for the shares so allotted.

In addition to what James, Lord Justice, said on page 476, quoted in *London Trust Co., Ltd.*, v. *Mackenzie, ante*, Brett, Lord Justice said:

(Page 478): "I agree that if shortly after such a transaction directors admitted new shareholders, it would be strong evidence that they intended at the time to take in new members, and unless all the circumstances are disclosed to them the directors might be made liable for misfeasance because it would be inferred that they intended to act for the future members as well as the present."

And again, Cotton, Lord Justice, said:

(Page 479): "We have not heard counsel on behalf of the respondent but subject to what they may aver I should have said that if this had been an ordinary company in which there was an intention to admit new members and offer the shares to the public, the official liquidator would have been entitled to call on the directors to account for the value of their shares. But on what principle? *It is that the directors stand in a fiduciary relation to the whole company, that is, not only to the existing members but to all whom they intend to bring in. A trustee can not make a profit for himself without the full knowledge of all his cestuis que trust, and so the directors of a company formed in the ordinary way stand in a fiduciary relation not only to those who are members at the time, but to all who may come in after.*" * * *

With reasoning such as this, the court would have had very little difficulty in holding directors liable, for issuing $150,000 of stock to themselves and using it to take $75,000 from the company, under an agreement made with themselves, after they had agreed to sell bonds and issue bonus stock, especially if they never really took the money until long after the bonds and stock had been issued and sold, and the new members were

in, and the money was taken from the proceeds of the very loan which had brought in the new members.

(4) Another English case is that of *In Re Anglo French Co-operative Society*, L. R., 21 Ch. Div., 492.

In that case the directors paid to a promoter £3,000 for expenses and for the discovery of a plan to float its debentures. The expenses were £400 and there was an understanding between the directors and promoters that the remaining £2,600 should be invested by the promoter in the debentures of the company to be floated. The £3,000 was paid to the promoter who retained £400 for expenses and bought of the company £2,600 of the debentures. The debentures so purchased were then divided according to arrangement between himself and the directors being all the persons interested at the time of the agreement in the company.

It was held that this was a clear misapplication of the £2,600 the funds of the company; *that the company could recover the full* £2,600 *from the directors;* that they were jointly and severally liable therefor; that the investment of the money in debentures of the company was not a repayment thereof to the company. Vice Chancellor Hall, who delivered the opinion of the court, said:

(Page 496): "No person who has any management or control of the affairs of a company, or who occupies any fiduciary position in reference to a company, can merely because such an agreement has been signed say that such a sum could be allowed as against the company or taken out of its assets.

"The amount itself shows that it was not a proper payment. As has been observed this was a company that was going on. It is not like the case of the *British Seamless Paper Box Co.*, 17 Ch. Div. 467, which has been referred to by Mr. Grosvenor Woods. It is not a case of that kind. The parties were in the position of owing a duty not merely to the persons who were then interested in the company *but to all persons who should afterwards be in the company.* It seems to me that this was a clear misapplication of the money of the company." (Italics ours).

The decision was affirmed on appeal.

(5) Another case is that of *Gluckstein* v. *Barnes*, L. R. (1900) App. Cas. 240, decided by the House of Lords on appeal from the Court of Appeals where it was reported as *Re Olympia Co., Ltd.*, L. R. (1898), 2 Ch. 153.

In that case a secret profit was made by directors and promoters of a company.

In the course of his judgment, Lord Chancellor Halsbury said:

(Page 247): "They were to be sellers to themselves as buyers, and it was a necessary provision to the plan that they were to be both sellers and buyers, and as buyers to get the money to pay for the purchase from the pockets of the deluded shareholders.

"My lords, I decline to discuss the question of disclosure to the company. It is too absurd to suggest that a disclosure to the parties to this transaction is a disclosure to the company of which these directors were the proper guardians and trustees."

Lord Macnaghton said:

(Page 248): "And then comes the last act. *Secretly, and therefore dishonestly, they put into their own pockets the difference between the real and pretended price.*

"After a brief career the company is ordered to be wound up. In the course of liquidation the trick is discovered. * * *

"Disclosure is not the most appropriate word to use when a person, who plays many parts, announces to himself in one character what he has done and is doing in another. To talk of disclosure to the thing called the company, when as yet there were no share-holders is a mere farce. *To the intended share-holders there was no disclosure at all.* On them was practiced an elaborate system of deception." (Italics ours).

Lord Robertson said:

(Page 257): "The directors of the company are its executive organ; to them its interests are confided and in the present instance the comp ny, even in this its inchoate stage, was identifiable through i executive.

"I hold that from the moment this step was taken the coming directors stood in a fiduciary relation to the company, whose interests were to be in their sole hands. This conclusion rests not on technical rules of law, but on the dictates of fair play embodied in law. *The people for whom these gentlemen were bound to act were their coming constituents, the persons out of whose money they proposed to make their gain.*" (Italics ours.)

(6) The case as reported below *Re Olympia Ltd.*, L. R. (1898), 2 Ch. 153, also contains some significant expressions.

Lord Lindley, in the course of his judgment, said:

(Page 167) "What effect then has such a knowledge of such persons *on the right of the company* to claim the profit thus

being made by its directors and promoters out of it? My answer is, none whatever, except to deprive the directors who share in the profits of all possible defense to such claims. To say that the knowledge of such persons of their own conduct, which from first to last they were doing all they could to conceal, is to be treated as the knowledge of the company or of the share-holders, is to say that which is opposed not only to commen sense, but also to well settled principles of law." (Italics ours.)

Rigby, L. J., said:

(Page 173): "There never was the slightest intention on the part of any one of the directors to do his duty to the company with reference to the transaction impeached; *they were only trying secretly as regards the main bodies of the subscribers for shares to weave a net of legal technicality which might hamper the company in its endeavors to get rid of the fraud attempted to be practiced.*" (Italics ours.)

Cotton, L. J., said,

Page 175: "The corporate entity towards which the duty exists is a thing apart from the seven individuals who for the time being are the only corporators, and the question whether disclosure to them will suffice or not, will depend on whether the constitution of the company is really such that they can be in fact contemplated *as exhausting all the persons whom the company is intended to embrace.* There may be a company such as is sometimes called a private company or sometimes a one man company *where by its very constitution no one is intended to have, and can not be contemplated as being about to acquire, an interest in the company except the signatories themselves.* In such cases the fiduciary obligation might not extend beyond such persons: See Salomon's Case, L. R. (1897) App. Cases, p. 22.

"But where, as here, the very pith and marrow of the whole venture is that cash to the extent of one hundred and eighty thousand pounds shall be subscribed by the public for the benefit of the promoters and directors, *the duty extends to all the persons who are to be contemplated as about to become purchasers.* There is abundant authority for these propositions." (Italics ours).

In this connection Cotton, L. J., cited:

Erlanger Case, L. R., 5 Ch. Div. 73, 113 123.

In re British Seamless Paper Box Co., 17 Ch. Div. 471, 477-8.

All these cases only apply the principles laid down as far back as *Hitchens* v. *Congreve* (1828), 4 Russ., 562. There are many other English cases to the same effect.

Phosphate Sewage Co. v. *Hartmond*, L. R., 5 Ch. Div. 394.

Broderlip v. *Salamon*, L. R. (1895), 2 Ch. 323, 329.

Broderlip v. *Salamon*, L. R. (1897), App. Cas., 22.

In Re Postage Stamp A. D. Co., L. R. (1892), 3 Ch., 566, 576.

American cases are also not lacking:

Dickerman v. *Northern Trust Co.*, 176 U. S., 181, 203, 205.

Hoffman Steel & Coal Co. v. *Cumbrland C. & I. Co.*, 16 Md., 456.

Cumberland Coal & I. Co. v. *Sherman*, 30 Barb., 553.

It is true some of these cases are promoter cases. Is there any difference between the duties of a promoter and a director except in degree? Which owe the higher duty to the company? Were not these directors promoters of this loan for the company? Could they secretly issue and sell it stock at a profit to themselves without disclosure? Were they not, as Rigby, J., says, by the agreement of May 3, 1889, never disclosed, "trying to weave a net of legal technicality, which might hamper the company in its endeavor to get rid of this fraud"?

Does it take any imagination to reach the conclusion that, had Elliott, Johnson & Co., and the purchasers of the bonds and bonus stock known, as the undisputed evidence is they did not know, that the directors of the company, who had agreed to sell them bonus stock and bonds at eighty-five cents on the dollar, intended to take $75,000 of the proceeds of the sale to their individual use, they would never have consented to the arrangement? Were not these directors and officers bound to deal fairly and honestly with those they intended to take into the corporation? Did and does not the corporation represent them?

Could they sell them bonus stock and bonds at eighty-five cents on the dollar, and then secretly reduce the assets of the corporation $75,000 by a private agreement between themselves as stockholders and directors to sell "bonus stock"—their stock—to the purchasers of bonds without the latter's knowledge! Were not Elliott, Johnson & Co., and the purchasers from them, entitled to be informed that the stockholders had agreed with the directors to sell stock to them at fifty cents on the dollar

and bonds of the company at sixty cents? Did it take any acquaintance with legal principles to apprise the Carlisles and Harrises that they were dealing unfairly with these purchasers, and that they were dealing with the funds of the corporation as if they were the only parties in interest? Was not their failure to disclose the agreement of May 3d, 1889, dishonest? Was not their secret taking, and therefore in the language of *Re Olympia, Ltd.*, "dishonest taking" of the $75,000 after these stockholders had come into the company, a gross fraud and misapplication of its assets?

Indeed it is difficult to see on what theory the transaction can be discussed. *The burden of proof was upon the defense to show entire good faith in the transaction and the fullest disclosure of all the facts to all who were actually or potentially interested.* Instead of that the complainant established by the mouth of one of the chief participants in the fraud the facts which show a deliberate, long-planned and successfully executed fraud upon those to whom he and his co-directors occupied a fiduciary relation, at a loss to the company of $75,000 of its assets. And yet the Circuit Court of Appeals says the corporation can not recover its own money.

IV.

CONCLUSION.

(1) In view of the important consequences of the decision as to the jurisdiction of a suit brought in the name of a corporation in a foreign jurisdicion by a receiver,

(2) And in view of what seems to us to be a manifest fraud and a misconception of the nature of the case by the Circuit Court of Appeals for the Second Circuit, we respectfully ask that a writ of *certiorari* be granted.

HARLAN CLEVELAND,
of Counsel for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 217

THE GREAT WESTERN MINING & MANUFACTURING COMPANY, by L. C. BLACK, its Receiver, *Petitioner*,

vs.

CHARLES A. HARRIS et al., Executors of B. D. HARRIS, Deceased, *Respondents*.

BRIEF ON BEHALF OF THE PETITIONER

STATEMENT OF THE CASE.

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(1) What the Circuit Court of Appeals Decided.

The Circuit Court of Appeals for the Second Circuit decided in this case:

1st. That the United States Circuit Court for the District of Vermont had no jurisdiction of a suit brought by The Great Western Mining & Manufacturing Company, a Kentucky corporation, by its receiver against a citizen and resident of Vermont under the direction and authority of the United States Circuit Court for the District of Kentucky; and,

2d. That, even if the court had jurisdiction of the suit, no right of action was vested in the corporation to recover $75,000 of the funds of the company, which the directors and officers had secretly and fraudulently misappropriated to their own use, but that such right of action was vested in the creditors, or the receiver as representing the creditors. (Rec. 387-400.)

The case below is reported as Great Western Mining & Mfg. Co. vs. Harris' Estate, 111 Fed. 38; S. C. 128, Fed. 321.

(2) The Suit.

This suit was brought by The Great Western Mining & Manufacturing Company by L. C. Black, its receiver, in the United States Circuit Court for the District of Vermont under the direction of the United States Circuit Court for the District of Kentucky, by which court the receiver was appointed, September, 1892, in a general creditors' and foreclosure suit. (Rec. 178, 179; Exs. 107-A, 109; Rec. pp. 364-367.)

The suit was against B. D. Harris, formerly the president and a director and one of the largest stockholders of the company. It was sought by the bill to charge him as a director and officer of the company, for the fraudulent misappropriation of $75,000 of its funds to his own use and that of his co-directors, and also for other acts of malfeasance and negligence. (Rec. 1-7.)

(3) The Great Western Mining and Manufacturing Company.

The Great Western Mining and Manufacturing Company was a corporation organized in 1856 under the laws of the State of Kentucky for the purpose of mining coal. Its authorized capital was $3,000,000, divided into thirty thousand shares of $100.00 each. Prior to 1888 and 1889 only $200,-

000 of this stock represented by 2000 shares had been issued. 28,000 shares representing $2,800,000 was treasury stock.

The outstanding stock was owned as follows:

B. D. Harris (president and director)	600 shares.
G. D. Harris (director)	600 shares.
John Carlisle (secretary, treasurer and director)	440 shares.
George W. Carlisle (director)	300 shares.
Geo. W. Richardson (vice-president and director)	52 shares.
Jas. C. Holden (director)	4 shares.
Loring Hinsdale (director)	4 shares.
Total	2,000 shares.

(Exhibit 106, Rec. pp. 297, 338; Exhibit 2, Rec. p. 208; Exhibit 10, Rec. p. 214; Ex. 15, Rec. p. 219-220.) From 1883 to 1889 these gentlemen had filled these positions, and had operated the company, whose business was the mining of coal.

The mines of the company had been operated to a limited extent prior to the War. Their operation, however, had not proved either expedient or profitable, and they were abandoned and became dilapidated. (Rec. 50, 64, 66, 93-95; Ex. 106, Rec. p. 297, 301, 306, 321.)

In anticipation, however, of the completion of a railroad to the mines in 1881, the stockholders of the Company at that time, who, besides John and George W. Carlisle, consisted of R. B. Bowler, S. K. Shoenberger and Larz Anderson, had advanced, prior to 1883, to the Company for the purpose of opening up the old mines and other improvements about $56,773.20. Despite the building of the railroad, the operation of the mines was still unsuccessful and they steadily lost money.

(Ex. 2, Rec. 209; Rec. 35-40, 57-60, 64-66, 93-98; Ex. 106, Rec. 323, 329, 332, 333, 335.)

The stockholders, other than the Carlisles, were not pre-

pared to advance any more funds on a losing venture. Therefore on November 15, 1883, B. D. Harris and Geo. D. Harris bought out the interests of Bowler, Shoenberger and Anderson and became the owners each of 600 shares of stock for which they paid $30.00 per share or $18,000.00 each.

(Rec. 57, 59; Ex. 106, Rec. p. 331, 334, 335, 336.)

(4) The History of the Property from 1883 to 1889.

Upon the reorganization of the Company by the coming in of B. D. Harris and G. D. Harris, a mortgage of $60,000.00 was at once placed upon the property. (Rec. 68; Ex. 2, Rec. 209.) New mines were opened from time to time and the old ones abandoned as they were exhausted and became valueless. (Rec. 35-40, 59, 91, 93-94, 97, 98, 158-160, 162-165; Ex. 100, Rec. 336, 339, 343.)

The investment represented by the old mines thus became worthless to a great extent.

There is attached to the evidence of John Carlisle as Exhibit 2 a paper which is an original copy of the financial history of this Company from 1883 to 1889. After much hesitation John Carlisle, Secretary and Treasurer of the Company, finally admitted that it was prepared by himself for the benefit of his co-directors and stockholders, at the time of the increase of the stock and the floating of $300,000 of bonds, and that its contents were familiar to all of them. (Ex. 2, Rec. 208-212; Rec. 61-77.) From this statement it appears that the company year by year became more involved and by December 31st, 1888, was hopelessly indebted to the amount of $131,585.03, consisting of

Floating indebtedness	$91,585.03
Bonded indebtedness	40,000.00
Total	$131,585.03

(Ex. 2, Rec. pp. 209-212; Rec. 68-76; Ex. 105, Rec. 296.)

(5) The Stock and Bond Issues.

It was this desperate condition of the company and the relations of the officers, directors and stockholders of the company to it that no doubt brought about the fraudulent transactions which are the subject of complaint in this suit. Not only were the Harrises and Carlisles in danger of losing their original investment in stock, but also their advances to the company, and in addition they were liable for their endorsement on the notes of the company.

Of the indebtedness which existed on January 1st, 1889, almost the entire amount was owing to the directors or they were individually responsible for it.

There was due	
To John Carlisle	$36,771.96
To John Carlisle	7,000.00
To John Carlisle	25,069.22
To Cheshire Savings Institution—Note $15,000, endorsed by directors	15,000.00
To O. C. Phelps—Note, $5,000, endorsed by directors	5,000.00
To G. S. Richardson, a director	775.30
To 21 bonds held by Harris and family	21,000.00
To 8 bonds, Carlisle	8,000.00
	$118,617.48

(R. Ex. 2, 212; Rec. 68, 69; Ex. 98, pp. 97-98.)

Such had been the condition of affairs as seen from Exhibit 2 for three or four years prior to 1889.

As early as 1887 the determination had been formed by the directors to issue $300,000 of bonds on the plant. The ostensible purpose of this was to provide additional capital to increase the output of the mines. It is so pleaded in the answer in this case, recited in the minutes of the company,

and represented to the brokers. The real purpose was, to get back the money the directors had directly or indirectly advanced to the company, to save themselves on their endorsements, and to get out their investments in worthless stock. Nothing but a fraud could accomplish such a purpose and they proceeded to perpetrate it. They all shared in it and had full knowledge of the entire transaction (Rec. 63, 112, 119, 121.)

To carry out their object the directors began to prepare as early as November, 1887 (Rec. 103, 112, 117).

On November 10, 1887, at a called meeting of the directors of the Great Western Mining and Mfg. Co., at which B. D. Harris, G. D. Harris, J. C. Holden and John Carlisle were present, Mr. Carlisle, secretary and treasurer of the company, "reported that the business at the mines was unusually good," * * * "and the only thing lacking was sufficient capital to enable the company to increase the output enough to meet the demand." He also reported: "That a large amount had been expended this year for permanent improvements out of the earnings of the company, the total for the past three years amounting to over $50,000." (Ex. 106, Rec. 344.)

A meeting of the stockholders was therefore authorized to be called on January 11th at Cincinnati "for the purpose of acting on an increase of the capital stock to the amount of $50,000, to be divided pro rata among the stockholders, being the amount of net earnings expended in permanent improvements." (Ex. 9, Rec. 213; Ex. 106, Rec. 344, Rec. 101-102.)

As a matter of fact, on their own showing (Ex. 2, Rec. 211-210), the earnings of the company for the

past four years (1884, 1885, 1886 and 1887) had amounted to only		$34,774.01
Interest, charges, dividends, etc., had been paid therefrom to the amount of	$23,876.21	
And interest had accumulated in favor of John Carlisle, which should have been paid in the sum of....	7,698.70	31,574.91
Net earnings		$3,199.10

Nevertheless, on January 11th, 1888, the stockholders met at Cincinnati and the following resolution was unanimously adopted by 1990 shares out of 2,000.

"Whereas, There has been expended for permanent improvements and betterments, including barges, flats, opening of new mines and machinery, etc., during the past three years, the amount of $64,666.44, all of which sum has been furnished from the net earnings of this company;

Resolved, That the stockholders being entitled to the amount the president and secretary be authorized and directed to issue five hundred shares of stock of this company to be divided pro rata among the stockholders of this company as follows:

To B. D. Harris, one hundred and fifty shares.
G. D. Harris, one hundred and fifty shares.
John Carlisle, one hundred and ten shares.
G. W. Carlisle, seventy-five shares.
George S. Richardson, thirteen shares.
James C. Holden, one share.
L. Hinsdale, one share."

(Rec. 102; Ex. 10, Rec. 213; Ex. 106, Rec. 344.)

This action of the stockholders was approved by the directors and the stock issued. (Rec. 102; Ex. 11, Rec. 214; Ex. 106, Rec. 345.)

(6) The Negotiations for the Sale of Bonds.

Meanwhile the issue of bonds or the securing of a loan on the property was being actively pushed. The directors

having themselves failed to accomplish anything, took up the matter with a man by the name of Vernon, who undertook to float a loan of $250,000. During the time he had it in charge Mr. Carlisle on August 11, 1888, wrote a letter to B. D. Harris at Brattleboro, Vermont, as follows:

"Hon. B. D. Harris,

Dear Sir: As I wrote you from New York, Mr. Vernon and I hurriedly prepared a new statement which he had type-written and forwarded to me to-day. Mr. Tyler and I went over the statement you sent together with Mr. Vernon's and made several alterations on the latter. I return herewith both to you to criticize, fix up and send to Mr. Vernon. He will have them type-written for us. Mr. Tyler is of the opinion the words 'necessary expenses and outlays' will cover as he expresses it 'a multitude of sins' and enable us to use the money received from sale of bonds, that is, what is left over and above paying the debts and working capital" (Rec. 125).

On August 16th, 1888, he wrote to G. D. Harris, the brother of B. D. Harris, a letter intended for both, as follows:

"Dear Sir:

Mr. Vernon is trying to place $250,000 of bonds of our Mining Co. for the purpose of retiring the $60,000 of 7 per cent. bonds that we now have, paying the floating debt of $50,000 which is now due, and enlarging our facilities for doing business by building more houses, a new store, a saw mill and furnishing property in Cincinnati where we can elevate our own coal, for which I am now paying about $1,000 a month, and enable us to retail coal here without paying tribute, then give us some capital to buy our supplies for cash. In this latter item, in elevating coal, we can almost save sufficient to pay the interest on $250,000. After all this is done I think there will be left sufficient to divide that will almost refund to us what our stock cost us, $70,000." (Rec. 125, 127, 129, 132, 134, 138, 195, 196, 199.)

These letters disclose the purpose which was animating the directors and officers of this company, viz., to raise funds on a loan and use them not only to pay back to themselves their

advances, but also from what was left over "to refund" the original cost of their stock to the amount of $70,000.00.

Vernon's efforts, however, appear to have been unsuccessful and were abandoned in the fall of 1888 or the early part of 1889. At that time Mr. Carlisle met a Mr. Scott, a representative of the firm of Elliott, Johnson & Co. of Wilmington, Delaware. Negotiations were opened with Elliott, Johnson & Co. to undertake the sale of the bonds which afterwards were successfully carried through. (Rec. 63, 103, 104, 126-137; Ex. 98, Rec. 271-292; Exs. 16-93, Rec. 233-265.)

They were conducted by John Carlisle as secretary and treasurer of the company on the part of the company and Henry P. Scott on the part of Elliott, Johnson & Co. (Rec. 11, 12, 19-24, 63, 103, 126-139; Ex. 98, Rec. 271-292.)

At the very beginning of these negotiations preparations were made to further increase and divide capital stock

On January 15th, 1889, at a special meeting of the directors, the following resolution appears on the minutes:

"It appearing that the item of Construction Account shows over $150,000.00 have been paid for improvements and betterments from the net earnings of the company, which amount properly belongs to the stockholders of this company it was, upon motion of Mr. Hinsdale,

"Resolved, That the attention of the stockholders at the next annual meeting be called to the fact of such appropriation of the net earnings with the request that they instruct this board what action to take."

"The Secretary reported that the President, B. D. Harris, and himself had conferred with Eastern capitalists on the subject of additional capital for the company and that they recommend the issuing of first mortgage bonds which could be sold at about eighty cents on the dollar." (Rec. 102: Ex. 12, Rec. 214; Ex. 106, Rec. 347.)

Negotiations continued. John Carlisle made several visits to see the brokers. He wrote them letters. B. D. Harris also wrote letters.

March 23d, 1889, Carlisle wrote to Elliott, Johnson & Co.:

"Will you kindly inform me what are the prospects for placing the bonds of the Great Western Mining and Mfg. Co., and when you will be able to send some one out to examine the property." . . . (Ex. 68, Rec. 255.)

April 1st, 1889, he wrote:

"I feel confident of your ultimate success in placing our bonds if you will persevere, and that I am sure you would do if you saw the property.

"I expect to go East next week and will be glad to meet you in Philadelphia on Monday or Tuesday next. I might possibly assist you in starting the ball rolling. Yours truly,

John Carlisle."

(Ex. 70, Rec. 255.)

The same day, April 1st, 1889, he wrote to B. D. Harris:

"I enclose letter from Elliott, Johnson & Co. Although not encouraging I think there is a gleam of hope in it. I have written that I feel confident they would succeed if they persevere, and I know they would do that if they only saw the property. I said I would meet them in Philadelphia next Monday or Tuesday if they ask. Possibly I might help them start the ball rolling. I think now is the time to offer additional inducement either in giving stock or a guarantee to the one who subscribes the first $25,000.00." (Ex. 98, Rec. 272.)

April 5th, 1889, Elliott, Johnson & Co., wrote to Mr. Carlisle:

"Wilmington, Del., April 5, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

Dear Sir: Mr. Needles has called our attention to your letter to him. We are disposed to take up your matter and offer your bonds to our customers and believe if we do so we will succeed in placing them. If we agree to do so provided our experts' examination is satisfactory will you put the matter in our hands, absolutely, and take $255,000.00 less 2½ per cent. for the $300,000.00 bonds? Yours truly,

Elliott, Johnson & Co."

(Ex. 25, Rec. 236.)

April 6th, 1889, John Carlisle wrote to B. D. Harris:

"I am daily expecting a letter from Elliott, Johnson &Co. If it comes to-morrow and is favorable I will leave to-morrow for Philadelphia. If I do I will wire you." (Ex. 98, Rec. 273.)

(7) The Agreement.

The expected letter came. Mr. Carlisle met Mr. Scott, of Elliott, Johnson & Co., and came to a verbal agreement with him as to the terms upon which the loan should be floated. This agreement was never formally embodied in any written instrument, but appears from the following correspondence:

(John Carlisle to B. D. Harris.)

"Cincinnati, April 13th, 1889.

In my hurried letter yesterday I do not know that I made matters plain. It is this: Messrs. Elliott, Johnson & Co. about one year since placed with the aid of Fisk, Hatch & Co. of New York, the bonds of the Shawnee Coal Co. of this city, who are mining two thousand tons per day. The bonds were sold at a discount, but were sugared with an even amount of stock dollar for dollar. They were confident if we would agree to this that they alone could float the loan. That would mean doubling our stock to which I strongly objected. At last I agreed subject to your approval to increase the capital stock to $350,000.00 or $400,000.00 and give $150,000.00 of stock with the bonds." (Ex. 98, Rec. 273.)

(John Carlisle to Elliott, Johnson & Co.)

"April 16, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

Gentlemen: . . . I wish you would kindly write me your proposition as we talked when I was with you in Wilmington last Friday, so that I can submit it formally to our board at their annual meeting on the 22d. Yours truly,

John Carlisle"

(Exhibit 73, Rec. 256.)

(Elliott, Johnson & Co. to John Carlisle.)

"Wilmington, Del., April 18, 1889.

Mr. John Carlisle, Cincinnati, Ohio.

Dear Sir: Your favor of the 16th received. We wrote you yesterday, which will cover what you request, but now restate that our plan is to undertake to float your bonds, provided the further examinations legal and engineering are favorable, without assuming any responsibility, so that the bonds with 50 per cent. of the Great Western Mining & Mfg. Co.'s capital stock, as a bonus, will net you 85 per cent.

Yours truly,

Elliott, Johnson & Co."

(Ex. 16, Rec. 233.)

(John Carlisle to Elliott, Johnson & Co.):

"April 27, 1889.

Messrs. Elliott, Johnson & Co., Wilmington, Del.

Gentlemen: At the meeting of the directors of the Great Western Mining & Mfg. Co., held on the 22d inst., your proposition, embodied in your letter of the 18th inst., undertaking to float the bonds of this company, so that the same should net the company eighty-five per cent. of the par value thereof, providing fifty per cent. of the par value of the bonds in the stock of the company should also be transferred with said bonds; and also provided that the results of further examination are favorable, was presented and accepted, and the secretary was directed to notify you of such action of the directors.

This gives you the exclusive authority to negotiate the sale of the bonds of the company. Very truly yours,

John Carlisle, Sec., etc."

(Ex. 79, Rec. 259.)

(B. D. Harris to John Carlisle):

"Brattleboro, Vt., June 3, 1889.

John Carlisle, Esq.

Dear Sir: . . . It was no part of our original plans with Elliott & Co. that we should engage in this business, and did not enter at all in our arrangement with them. Our plan was to sell $300,000.00 bonds with a bonus of $150,000.00,

stock outright and positively for the net sum of $255,000.00, and not buy at all. . . . Very truly yours,
B. D. Harris."

(Ex. 98, Rec. 280.)

The testimony of Carlisle & Scott does not in its essential features contradict this written record of the agreement (H. P. Scott, Rec. 19-24; John Carlisle, 118, 119, 103-105). Elliott, Johnson & Co. were thus given the privilege of buying from the company $300,000 of bonds for $255,000, to be accompanied by $150,000 of bonus stock. This was the first time a price had been fixed on the bonds.

For some inexplicable reason the lower courts seem to have fallen into two serious errors on the facts: (1) That the bonds could not be sold for 60 cents without stock, but only for 85 cents with the stock (Rec. 392). There is no evidence whatever of this or that it was attempted. (2) That the company had no treasury stock and in order to sell the bonds had to get it from stockholders (Rec. 398). There was $2,750,000 treasury stock on hand when the agreement was made by the company to sell the bonds at 85 cents with a stock bonus.

(8) The Fraud.

As stated in Carlisle's letter to Elliott, Johnson & Co., of April 27, 1889, the meetings of the above named stockholders and directors of the company were held on April 22, 1889. At the meeting of the stockholders the loan of $300,000.00 was authorized. The capital stock was also increased to $350,000, but instead of directing that the increase should be issued as bonus stock, as agreed, the stockholders and directors proceeded to work a scheme to fraudulently misappropriate $75,000.00 of the loan. They had been contemplating such a course for some time as before stated.

August 14, 1888, John Carlisle had written to B. D. Harris, relative to the bond issue.

"Mr. Tyler is of the opinion the words 'necessary expenses and outlays' will cover as he expresses it 'a multitude of sins' and enable us to use the money received from sale of bonds, that is, what is left over and above paying the debts and working capital." (Rec. 125.)

On August 16, 1888, he had written to G. D. Harris, the brother of B. D. Harris, a letter intended for both, in which apropos of the use of funds derived from the sale of the bonds he had said:

"After all this is done I think there will be left sufficient to divide that will almost refund to us what our stock cost us, $70,000." (Rec. 125, 127, 129, 132, 134, 138.)

And B. D. Harris in a letter to John Carlisle, April 27, 1889, referred to the matter as "our one chance." (Ex. 98, Rec. 274.)

The resolution of the stockholders, passed April 22, 1889, to carry out the scheme of fraud was this:

"The attention of the stockholders being called to the large amount of net earnings being used for construction and betterments, the following resolution was presented, and, after consideration, was adopted, to-wit:

"Whereas, There has been expended for permanent improvements and betterments, including machinery, barges, flats, etc., during the years 1884, 1885, 1886, 1887 and 1888, more than $160,000.00, all of which sum has been furnished from the net earnings of the company, and fairly belongs to the stockholders of the company.

"Therefore, Resolved, That the directors of this company be and hereby are authorized and requested to direct the president and secretary of the company to issue one thousand shares of the capital stock of the company to be divided pro rata among the present stockholders of this company as follows:

To B. D. Harris	360 shares.
G. D. Harris	360 shares.
John Carlisle	220 shares.
G. W. Carlisle	150 shares.
George S. Richardson	26 shares.

James C. Holden ..... 2 shares.
L. Hinsdale ..... 2 shares."
(Rec. 102; Ex. 13, Rec. 216; Ex. 106, Rec. 348.)

On the same day, April 22, 1889, the directors, pursuant to the authority granted them at the stockholders' meeting, passed the following resolution:

"Ashland, Ky., April 22, 1889.

"A meeting of the newly elected directors of the Great Western Mining & Manufacturing Company was held this day, immediately after the adjournment of the stockholders' meeting.

* * * * * * * * * * *

"The following preamble and resolutions were presented, and, after full consideration, were unanimously adopted, to-wit:

"'Whereas, The Great Western Mining & Manufacturing Company of Kentucky has power under its charter to borrow money and issue bonds therefor, and secure payment of the same by the mortgage of all or part of the property of the company; and

"'Whereas, At a meeting of the stockholders of the said company, held on the 22d day of April, A. D. 1889, the directors were authorized and requested to negotiate a loan of three hundred thousand dollars ($300,000), and to issue bonds therefor, and to execute a deed of trust or mortgage to secure payment thereof, on all the property of said company; and

"'Whereas, It is desirable to more thoroughly develop and to largely increase the output of the mines at Peach Orchard, and such development can not be secured without additional capital for the opening of new mines, for the purchase of additional machinery and working plant, and for the increase of terminal facilities; therefore

"'(1) Resolved, That this company will issue three hundred (300) mortgage bonds of the denomination of one thousand dollars ($1,000) each, to mature in twenty (20) years from June 1, 1889, and to bear interest at the rate of six per cent. per annum, payable semi-annually, etc., etc.

* * * * * * * * * * *

"'(2) Resolved, That the payment of the three hundred

bonds aforesaid as they respectively mature, and of the interest as it semi-annually becomes due and payable, shall be secured by a first mortgage or deed of trust, conveying to the Mercantile Trust and Deposit Company of Baltimore, Md., all the property, real, personal and mixed, of the Great Western Mining & Manufacturing Company, etc., etc.

* * * * * * * * *

"'(3) Resolved, That said deed of trust shall provide for the creation of a sinking fund in 1894, etc., etc.

* * * * * * * * *

"'(4) Resolved, That the said deed of trust shall provide especially against the creation of any further mortgage debt, etc., etc.

* * * * * * * * * *

"'(5) Resolved, That the preparation of the bond and deed of trust, in conformity with the foregoing resolutions, shall be entrusted to John Carlisle, and that the same, when duly approved by B. D. Harris, resident, shall be executed, etc., etc.

* * * * * * * * * *

"'(6) Resolved, That the president and secretary of the company shall arrange for the sale of the three hundred (300) bonds aforesaid, in their discretion, at the best price obtainable, and the proceeds thereof shall be applied to the cancellation and retirement of sixty (60) first mortgage seven per cent. bonds, dated Jan. 1, 1884, now outstanding; also to the payment of all floating indebtedness incurred up to the date thereof, for material and construction, and the balance shall be used by the directors for the best material interests of the company.'" (Ex. 14, Rec. 217; Ex. 106, Rec. 349-351.)

This resolution had been submitted to Elliott, Johnson & Co. by John Carlisle, April 15, 1889 (Ex. 72, Rec. 256), and returned by Elliott, Johnson & Co. to John Carlisle, April 17, 1889, in a letter in which they had stated that "also other resolutions should be passed covering the issuance of stock and the fifty per cent. bonus." (Ex. 18, Rec. 233.)

The directors at the same meeting, April 22, 1889, passed also this resolution:

"Whereas, at the annual meeting of the stockholders of

this company, a resolution was adopted requesting the directors to issue additional capital stock of this company to the amount of $100,000.00 to be divided pro rata among the present stockholders and based upon the fact that during the last five years more than $160,000.00 of the net earnings of the company have been expended for permanent improvements and betterments, thereby adding that amount to the assets of the company which belong to the stockholders of the company.

"Therefore, Resolved, That the president and secretary of this company are hereby directed to issue one thousand shares of the capital stock of the company to the present stockholders in proportion to the amount of stock already owned by them respectively, and that they furnish certificates of such stock as follows:

To B. D. Harris .....300 shares.
G. D. Harris .....300 shares.
John Carlisle .....220 shares.
G. W. Carlisle .....150 shares.
Geo. S. Richardson ..... 26 shares.
James C. Holden ..... 2 shares.
Loring Hinsdale ..... 2 shares."

(Ex. 14, Rec. 218; Ex. 106, Rec. 351; Rec. 102, 103, 110, 111).

This action was reported to Elliott, Johnson & Co. as follows:

(John Carlisle to Elliott, Johnson & Co., April 27, 1889.)
(Ex. 80, Rec. 258).

"Messrs. Elliott, Johnson & Co.,
Wilmington, Del.,

"Gentlemen: . . . I enclose herewith an official formal acceptance of your proposition.

"At our meeting of the 22d inst. we increased the capital stock to $350,000. . . .

Yours truly,
John Carlisle."

The recitals supposed to justify the distribution of this stock among these directors and officers as stockholders were absolutely untrue. Net earnings had not gone into better-

ments between 1883 and 1889. The history of the financial condition of this company between those years (Ex. 2, Rec. 209-212) prepared by John Carlisle for the information of the stockholders and directors at this very time shows this fact beyond question. (Ex. 2, Rec. 209-202, 67-76).

The earnings of the company from 1883 to 1889, although every possible expense had been charged to construction account instead of operating expense (Letter, John Carlisle to B. D. Harris, Feb. 2, 1888, Ex. 98, Rec. 271) were by their own statement as follows: (Ex. 2, Rec. 209-212).

1884	$2,669.34
1885	4,503.19
1886	6,021.81
1887	21,579.67
1888	30,610.95
Total	$65,384.96

These earnings, however, simply represented the difference between the amount received from the operation of the mines and store and the expenses of such operation (Rec. 69). Dividends, interest and other fixed charges were not deducted as should have been to reach the actual net earnings. These were as follows according to Exhibit 2:

1885	Dividends paid	$4,000.00
	Interest paid	3,490.00
	" "	4,651.72
	" "	1,122.29
1886	" "	3,490.00
	" "	3,632.20
1887	" "	3,490.00
1888	" "	3,046.99
	Interest	3,490.00
	Dividends	4,500.00
1889	Dividend Jan. 1st	1,500.00
		$36,413.20

In addition there were paid to John Carlisle in 1887, $11,543.96, and in 1888, $12,497.55, which sums included interest. Interest was also allowed to accumulate and turned into principal notes to John Carlisle as follows:

1885	$4,651.71	
1887	3,046.99	$7,698.70
		$44,111.90
Deduct from earnings		$65,384.96
Fixed charges, dividends & interest		44,111.90
Actual net earnings		$21,273.06

John Carlisle also testifies that there was due to him for commissions for 1888 and 1889, $8,799.80, which had been omitted (Rec. 115).

On April 27, 1889, the day Carlisle sent the formal acceptance of the Company to the proposition of Elliott, Johnson & Co., to float the bonds with fifty per cent. of the stock as a bonus so that the same should net the company eighty-five per cent. of the par value thereof, and told them the capital stock had been increased for that purpose, he wrote this letter to B. D. Harris, the defendant in this case.

(John Carlisle to B. D. Harris):

"April 27, 1889.

"I have yours of the 24th. I enclose letter received to-day from Elliott, Johnson & Co. with a copy of my formal acceptance of their proposition. I believe they can do much better, if not hampered with conditions.

"I also enclose a proposition of the stockholders which Mr. Tyler carefully prepared so that we could legally take the $75,000.00." (Ex. 98, Rec. 274.)

The proposition of the stockholders, which was enclosed, is as follows:

Proposition of Stockholders of The Great Western Mining & Manufacturing Company to the Directors of said Company.

"Whereas, The directors of the Great Western Mining & Manufacturing Company have taken steps to borrow the sum of $300,000.00 to be used in payment of existing indebtedness of the company and to provide additional working capital, etc., and have authorized the president and secretary to execute bonds for said amount, and to negotiate the same at the best price obtainable;

"And Whereas, We are informed that it will probably be possible to find purchasers for said bonds at the price of eighty-five per cent. of the par value thereof, provided that stock of the company, to the extent of fifty per cent. of the par value of the said bonds, shall also be transferred to the several purchasers of said bonds:

"And Whereas, It is deemed to be inexpedient to issue any new stock of the company for such purpose; and desiring to do all we can to assist the directors in procuring said loan and the sale of said bonds:

"We therefore make this proposition to the directors of the company in reference to the sale of stock held by us in said company, to the purchasers of the said bonds, to-wit:

"We will sell to the several purchasers of said bonds of the company, stock of the company belonging to us, in the amounts set opposite to our names respectively, and will furnish to the secretary of the company certificates of said stock, assigned in blank, to be by him delivered to said purchasers of said bonds, upon the understanding and agreement, that we are to receive the sum of $50.00 for each share of stock so sold by us, out of the money paid for said bonds and said secretary shall act as our agent in receiving said amounts, and shall pay us the same, before the company shall be entitled to have the remainder of the money paid for said bonds by the purchasers thereof.

"This action is not to be construed as a proposition to sell said stock to the company, but it is to be treated and regarded as a sale of stock directly to the purchasers of said bonds, to

be paid for by them to us, and the payment by them to the secretary of this company, for said bonds, shall be regarded as a payment to us for said stock, to the extent necessary to pay us therefor upon the terms above stated.

"In testimony whereof we have hereunto set our hands, on this third day of May, 1889.

B. D. Harris	450 shares.
G. D. Harris	450 shares.
John Carlisle	336 shares.
Geo. S. Richardson	39 shares.
G. W. Carlisle	225 shares.
Total	1,500 shares."

It was signed by all the stockholders, except Hinsdale and Holden, submitted to themselves, as directors, and agreed to on May 13, 1889, long after the contract to sell the bonds with the bonus of stock so as to net the company eighty-five cents on the dollar had been made (Ex. 93, Rec. 264; Ex. 106, Rec. 352, 353).

It is needless to say that it was not communicated to Elliott, Johnson & Co., or to any one else. It was studiously and intentionally concealed. Neither they nor any purchaser of bonds and bonus stock, although the Circuit Court of Appeals in its opinion suggests that no one was deceived, knew of it until 1894, when L. C. Black, the receiver, discovered it from the books and records of the company. The evidence on this point is uncontradicted. (Rec. 111, 19-24, 29-36; Ex. 108, Rec. 365.) What is more, contrary to the statement in the opinion of the Circuit Court of Appeals, the bill expressly charges: "That the matters and things set forth in this bill were not discovered until the month of March, A. D. 1894, when the said receiver examined the books and papers of said company, and that said discovery was not before made for the reason that said defendant, and the other said directors and stockholders of said company remained in charge of said company, its books and papers, until the appointment of the

receiver, as herein mentioned." (Rec. 7.) The answer does not deny this allegation.

(9) The Result.

Elliott, Johnson & Co. proceeded in good faith to take the bonds with the bonus of stock, according to their contract. The entire issue of bonds was turned over to them. As they sold the bonds they accounted to the company for 85 per cent. of the face value thereof, beginning June 3, 1889, and gave the names of the persons to whom the supposed bonus stock at the rate of fifty cents of stock for each dollar of bonds sold should be issued by the company. (Ex. 41, 42, 43, 31, 32, 33, 36, 37, 40, 46, 47, 49, 50, 55, 61, 62, Rec. 244, 245, 240-243, 246-250, 252; Rec. 130, 131.)

John Carlisle, who was secretary and treasurer of the company at Cincinnati, upon receipt of their letters surrendered stock of his own or of his brother and issued new certificates in the names of the persons directed and forwarded them to Elliott, Johnson & Co. Later the matter was equalized by the Harrises and Richardson surrendering their quota of stock to Carlisle. (Rec. 130-131; Ex. 15, Rec. 219-229.)

After these new bondholders and stockholders had thus been brought into the company, and by January 11th, 1890, Carlisle as treasurer of the company paid out of the proceeds of the bonds remitted to him, unknown to those thus brought into the company, in accordance with the secret plan of the stockholders and directors, the $75,000.00 as follows:

B. D. Harris	$22,500.00
G. D. Harris	22,500.00
John Carlisle	16,800.00
G. W. Carlisle	11,250.00
Geo. S. Richardson	1,950.00
	$75,000.00

(Rec. 116, 130-131; Ex. 98, Rec. 286.)

The result of the transaction as shown by the books of the company under date of April 1, 1890, is as follows, ignoring accrued interest:

Dr.

Proceeds of sale of bonds at 85 cents	$255,000.00
	$255,000.00

Cr.

Bond expense—Prof. Weatherby's Fee	$350.00
Bond expense—Mercantile Trust Co.	300.00
Bond expense—H. B. Huey, attorney	100.00
Bond expense—Notary	4.00
Bond expense—Registering bonds	60.00
Bond expense—Lithographing	196.00
Bond expense—Blue print maps	10.00
Bond expense—E. Vernon, drawing papers, etc.	480.00
Bond expense—Printing	20.00
Bond expense—Printing	91.00
Bond expense—R. Tyler, attorney	250.00
Bond expense—Telegrams	5.00
Bond expense—Traveling expenses	500.00
Bond expense—Returned to stock holders 1,500 shares of stock to issue to new bondholders as per agreement, May 3, 1889	75,000.00
First mortgage bonds	60,000.00
John Carlisle, balance due Jan. 1, 1889, and int. 1 year	5,416.37
John Carlisle, treasurer, balance due Jan. 1, 1889, and int. 1 year	21,156.57
John Carlisle, 1st note	12,720.00
John Carlisle, 2d note	12,000.00
John Carlisle, 3d note	12,771.06
John Carlisle, 4th note	7,000.00

John Carlisle, interest on said notes .. 3,392.61
John Carlisle, commissions 8,779.50

Total $220,603.01

Balance left $34,396.99

(Rec. 113-116; Exs. 94, 95, 96, Rec. 266-270.)

$34,396.99 was all that was left out of $255,000.00 after paying the $60,000 of old mortgage bonds, the expenses of issuing the bonds, the $75,000.00 misappropriated by the directors, and the claims of John Carlisle.

Three years afterwards, September, 1892, a receiver was appointed. Claims were filed and allowed by the United States Circuit Court for the District of Kentucky as follows:

Unsecured floating debt $96,650.91
Bonded indebtedness with interest 318,675.00

$415,325.91

The entire assets of the company sold for the following:

Mines, real estate, improvements. $70,000.00
Goods in store 5,666.67

Total realized $75,666.67

This indebtedness largely, if not entirely, had accumulated between 1889 and the failure of the company in September, 1892. (Rec. 148; Ex. 107; Ex. 110, Rec. 367-372; Ex. 111, Rec. 373-377; Ex. 112, Rec. 377-378; Ex. 113, Rec. 379-385.)

Up to the failure of the company, in September, 1892 and thereafter, B. D. Harris, his brother, G. D. Harris, John Carlisle, his brother, Geo. W. Carlisle, Geo. S. Richardson, Loring Hinsdale and James C. Holden, who had perpetrated this fraud, continued to be the directors and officers of the company in charge of its affairs, as they had been in 1885 to 1889. (Ex. 106, Rec. 353-362.)

(10) The Holdings of the Courts Below.

The Circuit Court for the District of Vermont found that the estate of B. D. Harris, he having meanwhile died, was liable to account for $15,000.00 being the amount abstracted by Harris from the company in exchange for the three hundred shares of stock issued to himself in April, 1889, at the time the loan was floated; but held that his estate was not liable for the remainder of the $22,500.00, or $7,500.00 taken by him in exchange for stock issued to him in January, 1888; and also held that his estate was not liable to account for the remainder of the $52,500.00 taken by the other officers and directors and stockholders with his connivance and consent. The court seemed to think that had the Harrises and Carlisles legitimately owned the stock, the transaction would have been perfectly regular, whereas had the stock been really their own, it would have been a fraud on the company to have applied it to such a use with such a purpose, since even such a sale to the company under such circumstances and with $2,750,000 treasury stock on hand would have been a dishonest bargain for the directors to have made. (Rec. 185-191, 111 Fed. 38.)

On cross appeals to the United States Circuit Court of Appeals for the Second Circuit, the appeal of the Harris estate was allowed, and the decree of the court below reversed with instructions to dismiss the bill on two grounds:

1st. That the United States Circuit Court for the District of Vermont had no jurisdiction of the suit brought by The Great Western Mining & Manufacturing Company by its receiver;

2d. That even if the court had jurisdiction, the suit could not be maintained either by the corporation or on its behalf, because all the stockholders interested in the company at the time of the distribution of stock in April, 1889, and the sale thereof at fifty cents on the dollar under the proposition to

the directors of May 3, 1889, had assented thereto except Holden. (Rec. 386-400, 128 Fed. 321.)

ARGUMENT.

FIRST POINT.

The United States Circuit Court for the District of Vermont had jurisdiction of the Suit.

The United States Circuit Court of Appeals upon the question of jurisdiction cited the following cases:

Booth vs. Clark, 17 How. 322.
Hale vs. Allison, 188 U. S. 56.
Evans vs. Nellis, 187 U. S. 271.
Finney vs. Guy, 189 U. S. 335.
Hilliker vs. Hale, 117 Fed. 220.

Booth vs. Clark decides that a receiver appointed in a creditor's suit in New York seeking to subject choses in action of his debtor to the payment of a judgment could not maintain a suit in his own name as against an assignee in bankruptcy in the Circuit Court for the District of Columbia to subject a fund arising from a claim against Mexico to the payment of the judgment.

Hale vs. Allison, Finney vs. Guy and Hilliker vs. Hale decide that a receiver appointed by a Minnesota Court in a suit brought by creditors to enforce the statutory double liability of stockholders could not maintain a suit as receiver in a foreign jurisdiction, the fund when recovered not being assets of the corporation and such an action not being maintainable even in Minnesota.

In Evans vs. Nellis it was held that under the statutes of Kansas, as interpreted by the Supreme Court of that State, the receiver could bring an action only against the corporation and all the resident stockholders to collect the statutory liability of stockholders for the benefit of all creditors, and

therefore such receiver could not maintain an action in a Circuit Court of the United States in a foreign jurisdiction against an individual stockholder for the amount of the statutory liability.

In short these cases simply decide, at the utmost, that an ordinary receiver in whom no title has vested appointed by a court of one state can not maintain a suit in a court of another state, in his own name, to recover assets or to enforce the double liability of stockholders.

But the Circuit Court of Appeals for the Second Circuit went much further. It said:

"We think these considerations apply with equal force to the right of the receiver to maintain this suit in the name of the corporation. * * * But if said court can not send such an agent outside of its territorial limits to collect moneys as receiver, its attempt to exercise extra territorial powers, by directing such agent to proceed in the name of the corporation, must be equally futile except where the court by statute, or otherwise, is empowered to vest title in the receiver, or where the corporation or the court acting within its powers on behalf of the corporation, or as the successor of its officers, has authorized such act. Hilliker vs. Hale, supra, Great Western Telegraph Co. vs. Purdy (162 U. S. 329)."

But is not the court in collecting the assets of a corporation acting within its powers on behalf of the corporation, or as the successor of the officers of the corporation in directing suit to be brought by it and in its name?

When the United States Circuit Court for the District of Kentucky appointed a receiver of The Great Western Mining and Manufacturing Company, and by that act assumed charge of the assets and affairs of the corporation, did it not take the place and could it not exercise the powers of the directors? Did it have to consult the directors or ask their permission to bring a suit for the corporation? Could the court not execute any corporate function or direct any act

to be done for a corporate purpose that the directors could have done or directed to be done?

This court has repeatedly so held as to "a call or assessment" on stockholders for the unpaid portion of the subscription price of stock.

Scovill vs. Thayer, 105 U. S. 143, 155.

Hawkins vs. Glenn, 131 U. S. 319, 329, 335.

Glenn vs. Marbury, 145 U. S. 499, 510.

In Great Western Telegraph Co. vs. Purdy, 162 U. S. 329, 336, this court said:

"The order of that court was in effect, as it was in terms, simply a 'call or assessment' upon all stockholders who had not paid for their shares in full. It was such as the directors might have made before the appointment of a receiver; and in making it the court, having by that appointment assumed charge of the assets and affairs of the corporation, took the place and exercised the office of the directors. Scovill vs. Thayer, 105 U. S. 143, 155; Hawkins vs. Glenn, 131 U. S. 319, 329; Lamb vs. Lamb, 6 Bissell, 420, 424; Glenn vs. Saxton, 68 California, 353; Great Western Tel. Co. vs. Gray, 122 Illinois, 630, 636, 640; Great Western Tel. Co. vs. Loewenthal, 154 Illinois, 261."

If the court can make an assessment in place of the directors it is submitted it can direct a suit to be brought by the corporation in a foreign jurisdiction and authorize its receiver to see that the suit is brought just as the directors might have done had the court not taken charge of the affairs of the corporation. In such a suit the corporation is the actor not the receiver, and is set in motion by the court instead of by its former directors.

That is precisely what was done in the case of Great Western Telegraph Co. vs. Purdy.

An ordinary receiver appointed by the Circuit Court of Cook County, Illinois, under the direction of that Court, brought an action in the name of the Great Western Telegraph Company, an Illinois corporation, by himself as re-

ceiver against Purdy, a citizen of Iowa, to recover a sum alleged to be due from him to the company on his subscription to its stock. The jurisdiction of the District Court of Des Moines, Iowa, where the suit was brought, was not called in question either in the State Courts or in this Court.

In Hayward vs. Leeson, 176 Mass., 310, the question has been fairly raised and decided in a case very similar to the case at bar.

In that case the receiver of the East Tennessee Land Company was appointed in a creditor's suit by the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee. On the authority of that court he instituted an action in the courts of Massachusetts in his own name to recover from directors and promoters secret profits made by them without full disclosure of the fact to the future stockholders about to be taken into the company. The Supreme Court of Massachusetts, while holding that the receiver could not bring the suit in his own name, said:

(Page 324): "The last objection made by the defendants is that the plaintiff, as receiver, can not bring the suit in his own name; and we think that this objection is well taken. . . . The plaintiff, as receiver, by virtue of these orders, has the powers usually conferred by a court of equity upon a receiver to preserve property pending litigation, and nothing more. Mr. Justice Gray, speaking for the Supreme Court of the United States of the powers of a receiver under a similar order, said: 'The utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property.' Union Bank of Chicago vs. Kansas City Bank, 136 U. S. 223, 236. That such a receiver can not sue in his own name to enforce a right of action of the corporation is settled. Wilken vs. Welch, 157, Mass. 77."

* * * * * * * * * *

(Page 326): "Upon substituting the East Tennessee Land Company as plaintiff in place of John K. Hayward" (the re-

ceiver), "the causes are to stand for hearing as to what the net profits are, which the defendants have respectively received, or as to what the damages are, which the plaintiff has suffered, as the plaintiff shall elect to proceed for the property or its proceeds on the one hand, or for damages on the other hand."

This case is referred to in Hale vs. Allison, 188 U. S. 56, 70. Nothing that is said in Hale vs. Allison is in any way at variance with the principle contended for. Conceding that L. C. Black, as Receiver, could not have maintained this suit in his own name, the corporation by him can do so, when the court having charge of the corporate affairs so directs.

This is true without any statutory provision, but it is certainly true in view of the Kentucky Statute.

Under the Kentucky Codes, Sec. 302. "The receiver has, under the control of the court, power to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts and generally to do such acts respecting the property as the court may authorize."

SECOND POINT.

Even if the suit be treated as one brought by the Receiver in his own name, it is maintainable on the principle of comity.

As a general principle an ordinary receiver can not sue as a matter of right in his own name outside the jurisdiction of his appointment. By comity he may.

In Hale vs. Allison, 188 U. S. 56, 71, this court said that the principle of comity could not avail in a case brought in a foreign jurisdiction by a receiver in his own name, when the courts of the state in which the receiver was appointed hold that an action similar to the one brought in the foreign jurisdiction can not be maintained by him in the courts of the state of his appointment.

In Kentucky a receiver can bring an action in his own name. Kentucky Codes, Sec. 21.

L. C. Black as receiver could undoubtedly have maintained this suit in Kentucky in his own name. (Kentucky Codes, Secs. 21, 302.)

The State of Kentucky allows foreign receivers to sue in

The practice is entirely familiar to Courts of Chancery.

Thus in Taylor vs. Allen, 2 Atk. 213, Lord Chancellor Hardwicke appointed a receiver to collect the assets of a testator and empowered him to bring actions in the name of the executrix.

Pitt vs. Snowden, 3 Atk. 750.
Yeager vs. Wallace, 44 Penn. St. 291.
Merritt vs. Merritt, 16 Wend. 405, 410, 411.
Freeman vs. Winchester, 10 S. & M. (Miss.) 577, 580.
Green vs. Winter, 1 Johns. Ch. 60.

Lewis vs. American Naval Stores Co. 119 Fed. 396, 397.
Metzner vs. Bauer, 98 Ind. 425.
Boulware vs. Davis, 90 Ala. 207.
Cooke vs. Town of Orange, 48 Conn. 401.
Planters Bank vs. Bank, 2 La. Ann. 430.
Comstock vs. Frederickson, 51 Minn. 350
Hurd vs. City of Elizabeth, 41 N. J. Law. 1.
Sobernheimer vs. Wheeler, 45 N. J. Eq. 614.
Runk vs. St. John, 29 Borh. 585.
Barclay vs. Quicksilver Min. Co. 6 Lans. 25.
Pugh vs. Hurtt, 52 How. Pr. 22.
Dyer vs. Power, 60 Hun. 583.

L. C. Black as receiver could undoubtedly have maintained this suit in Kentucky in his own name. (Kentucky Codes, Secs. 21, 302.)

The State of Kentucky allows foreign receivers to sue in that state by comity when there are no domestic creditors requiring protection or no infringement of the public policy of that state or no injustice would be done thereby to the citizens within its jurisdiction.

Rogers vs. Riley et al. (Ky.) 80 Fed. 759, 760.
Zacher vs. Fidelity Trust & Safety Vault Co. (Ky.) 106 Fed. 593, 595.
Kirtley vs. Holmes (Ky.) 107 Fed. 1, 9.
Johnson vs. Roger's Receiver (Ky.) 43 S. W. 234.
Zacher vs. Safety Vault Co. (Ky.) 59 S. W. 493.
Weedon vs Association (Ky.) 59 S. W. 758.

This seems to be the general rule.

Howorth vs. Augle, 162 N. Y. 179.
Howorth vs. Lombard, 175 Mass. 570.
Howorth vs. Elwanger, 86 Fed. 54.
Sands vs. Greeley & Co., 88 Fed. 130.
Burr vs Smith, 113 Fed. 858.
Lewis vs. American Naval Stores Co. 119 Fed. 396, 397.
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Barclay vs. Quicksilver Min. Co. 6 Lans. 25.
Pugh vs. Hurtt, 52 How. Pr. 22.
Dyer vs. Power, 60 Hun. 583.

Merchants Natl. Bank vs. McLeod, 38 O. St. 174.
Porter vs. Stoughton Mill Co. 91 Wis. 174.
Wyman vs. Kimberly Clark Co. 93 Wis. 554.

There is nothing in the public policy or decisions of Vermont which preclude a foreign receiver from suing in the courts of that state, under the circumstances of this case. No creditor in Vermont has intervened to prevent the prosecution of this suit. In fact it nowhere appears that there are any Vermont creditors of The Great Western Mining & Manufacturing Company.

No claims by any Vermont creditors were presented to the Master appointed by the United States Circuit Court for the District of Kentucky. (Report of Master, Exhibit 111, Rec. 373-377.)

B. D. Harris' Estate alone is objecting to this suit being maintained.

THIRD POINT.

The right to recover on the one hand property of a corporation or its proceeds which have been misappropriated by officers and directors, or on the other hand damages for its misappropriation is in the corporation.

I.

This proposition has been settled by this court.

In Porter vs. Sabin, 149 U. S. 473, it is said, p. 478: "The right to maintain a suit against the officers of the corporation for fraudulent misappropriation of its property is a right of the corporation; and it is only when the corporation will not bring the suit, that it can be brought by one or more stockholders in behalf of all. Hawes vs. Oakland, 104 U. S. 450. The suit, when brought by stockholders, is still a suit to enforce a right of the corporation, and to recover a sum of money due to the corporation; and the corporation is a necessary party, in order that it may be bound

by the judgment. Davenport vs. Dows, 18 Wall. 626. If the corporation becomes insolvent, and a receiver of all its estate and effects is appointed by a court of competent jurisdiction, the right to enforce this, and all other rights of property of the corporation vests in the receiver, and he is the proper party to bring suit, and, if he does not himself sue, should properly be made a defendant to any suit by stockholders in right of the corporation."

In Van Weel vs. Winston, 115, U. S. 228, a bondholder attempted as creditor of the company to charge the president thereof with fraudulent misappropriation of the proceeds of the sale of the bonds. This court held that the bill was properly dismissed, because the wrong done, if wrong there was, was done to the company and not to the bondholders, and the right to redress was in the company or its stock holders.

II.

This is not a suit against B. D. Harris as a stockholder to recover $22,500.00 or $45,000 par value of stock which was issued to him as fully paid up, when he paid no consideration therefor. Such a cause of action, apart from the stock having been secretly distributed just before other stockholders and bondholders were about to be taken in, as the existing stockholders at the time of actual distribution, except Holden, assented, may be in the creditors.

Handley vs. Stutz, 139 U. S. 417, 426-428.

Camden vs. Stuart, 144 U. S. 104, 113-115.

It is not a suit brought on behalf of the bondholders and stockholders for fraudulent misrepresentation as to the value of the bonds or shares taken by them. Such right of action, as said by the United States Circuit Court of Appeals, would only lie in favor of the creditors to whom the misrepresentations were made.

It is not a suit against stockholders *as such* to annul the

alleged contract made by them with themselves as directors under date of May 3, 1889, and to recover the consideration paid thereunder, by which contract they in form pretended to sell stock to the purchasers from the company of bonds with a bonus of stock, but in reality turned it back to the corporation to issue to the purchasers of bonds as bonus stock. If it were, it may be that the stock would have to be tendered back by the corporation.

It is a suit against a director and the president of the company as such officer, having in charge its funds, to charge him with $75,000.00, part of the proceeds of a loan to and assets of the corporation, or what is the same thing dam ages in that amount for taking the $75,000.00, which came into his hands and under his control as an officer and director of the company, which he, as charged in the bill, conspired with his co-directors to fraudulently appropriate to the extent of $22,500.00 to his own use and to the extent of $52,500.00 to the use of his co-officers and co-directors; and in order to consummate s[illegible] fraud, adopted the plan, as charged in the bill, of s[illegible] issuing to himself and his co-directors $150,000.00 of stock without consideration, and of secretly turning it back to the corporation at fifty cents on the dollar, under the pretense of enabling it to carry out its contract to sell $300,000.00 of bonds at eighty-five cents on the dollar, with $150,000.00 of stock as a bonus, when, at the time, the corporation had $2,750,000 of the same stock in its treasury.

If the contract of May 3, 1889, between the stockholders and the directors be treated as anything more than a mere form, to help accomplish the abstraction of $75,000.00 it is maintainable as a suit to recover damages from a director for fraud in the sale of his and his co-directors' worthless stock to the corporation, which had $2,750,000 of the same worthless stock still in its treasury, to the damage of the corporation as representing all actually or potentially interested in it.

III.

The case is persistently attempted to be treated by the respondents as simply one by a corporation against stockholders because of a gratuitous distribution of stock among themselves. Demonstrating that such an action is not maintainable when all the stockholders assent, and thus getting the stock into the hands of Harris except as against subsequent creditors, they further attempt in order to meet the other phases of the case to treat the case as one where one person owns stock and another bonds, and they get together and appoint Carlisle agent to sell the two together for the lump sum of 85 cents on the dollar to purchasers, agreeing between themselves to divide the 85 cents in the proportion of 25 cents for stock and 60 cents for bonds.

They then say the purchasers of the bonds and stock can not object to this for it is none of their business if they got the bonds and paid-up stock, how the proceeds were divided nor the corporation because it was a party to it.

Even this theory of the contract of May 3, 1889, does not avail the respondents as the assumed owners of this stock were also the sole directors of the company which owned the bonds, and the court would look upon such an arrangement with much suspicion on its face and require the strongest evidence of good faith in order to sustain such a contract as against the corporation.

But the difficulty with this theory is that it is at variance with and ignores the most material facts.

The issues of stock and the contract of May 3, 1889, were in the first place dishonest, unfair and inequitable, and not in the interest of the company, but of the directors alone. The company did not have to pay out $75,000 for stock. It had $2,750,000 on hand. If these gentlemen had not been directors, who pretends to say such a contract would ever have been made by any honest directorate?

No one in the next place ever dealt with Carlisle as the joint agent of the owners of stock in The Great Western Mining & Manufacturing Company, and of the company as the owner of its bonds, or as the agent of unknown principal or principals. He acted as the secretary and treasurer of the company and its avowed agent alone. Elliott, Johnson & Co. had a contract with the company through him, April, 1889, giving them the privilege to buy $300,000 of bonds at 85 cents, for $255,000, to be accompanied with a gift of $150,000 of bonus stock.

This is the only contract. No one else came in contact with Carlisle or Harris, or other officer. The company had in its treasury $2,750,000 of stock, at the time this contract was made, and $250,000 of the stock was nominally owned by the stockholders. These stockholders were also the directors who had authorized the contract to sell the $300,000 of bonds for $255,000, and to give $150,000 of bonus stock.

The stock was worthless at the time. Carlisle attempts to say that Harris did not want to give up his stock. But Carlisle, except when corroborated by written documents, is not trustworthy. His letters of August, 1888, show what he and Harris wanted. Both courts below are in error when they say the bonds would not sell at 60 cents, but the bonds and stock together would sell at 85 cents. (Rec. 391.) There is no such evidence in the case. No attempt was ever made to sell bonds without stock at 60 cents. Even were it true the company had plenty of stock without paying $75,000 cash, for some more. If the Circuit Court of Appeals had realized the fact in place of thinking the contrary to have been the fact, it could not have so decided the case as it did.

Having made the contract to sell bonds at 85 cents, the directors authorized the issue of bonds at 85 cents, with a bonus of stock as agreed, but instead of issuing the treasury stock to the purchasers of the bonds, they, after the contract is

made, issue it to themselves secretly, then make a secret contract on May 3, 1889, with themselves as stockholders in form purporting to be a contract to sell stock to the purchasers of bonds, in reality being a contract to sell to the corporation the $150,000 of stock to supply that amount of stock as bonus stock to the purchasers of $300,000 of bonds for $255,000. But the directors were not agents of the purchasers of bonds to buy stock from themselves at 25 cents, and bonds from the company at 60 cents, or both for 85 cents, through Carlisle as a joint agent or otherwise. They had no such authority. They do not pretend to have had.

Besides the purchasers were to get "bonus" stock, i. e. stock which cost them nothing. But on respondents' theory they paid stockholders $75,000 for it. On the true theory they had their stock reduced in value by their proportionate interest in the $75,000 belonging to the company, which was secretly taken by the directors. It is necessarily one thing or the other. The purchasers were to get "bonus" stock and pay 85 cents for bonds. They did not get such stock.

The purchasers were buying bonds from the company at 85 cents and getting stock for nothing *from the company.* The directors, knowing this $255,000 proceeds of the $300,000 bonds was the money of the company under the terms of sale of the bonds, secretly issued stock to themselves and then turned it back to the company to issue as bonus stock. For this they contracted with themselves to pay $75,000, and thus made a secret profit as directors, and used that amount of funds of the corporation which were the proceeds of the sale of bonds.

It is said no one was deceived. The burden of proof was on the directors to show full disclosure to all about to be brought into the company. They could take the funds of the company in no other way. Not only did they fail to show full disclosure but the undisputed evidence is that no one

was informed of this transaction (Rec. 111, 24, 29-36, Ex. 108, Rec. 365).

Elliott, Johnson & Co. were not—and they had the contract giving them the right to purchase all these bonds for $255,000, and to be given $150,000 of stock. They became the owners of a large amount of this stock, so did Henry P. Scott, who negotiated the contract with Carlisle. (Ex. 15, Rec. 221-230.) He testifies they never knew of it (Rec. 24-25), and Carlisle admits that he and his co-directors kept it a secret and never told anybody (Rec. 111). The bill so alleges and it is not denied in the answer (Rec. 7). Whether Elliott, Johnson & Co. be treated as purchasers of the bonds and stock or as agents of the company, as they knew nothing, they could tell nothing. So no one could have known it, except these directors, who remained directors until the company failed. The bill charges that the issue of the stock by the directors to themselves was part of a scheme adopted for the purpose of abstracting from the assets of the company money accruing from the sale of the bonds, and solely for that purpose, that the scheme was carried out by the pretended contract of May 3d, 1889, and that it was never discovered until the month of March, 1894 (Rec. 4, 7).

So the court below is mistaken when it says that the bill fails to charge that any one was deceived, or that there is no evidence to that effect. (Rec. 397.) The bill so charges, and all the evidence on the subject is to that effect.

The transaction must be taken as an entirety. When so taken the net of legal technicality which is weaved about it disappears. The matter resolves itself into the simple proposition that directors of a company not being the only parties interested in the company, secretly took $75,000 of its funds for their own use. Their original investment had been $70,000. As a result of the transaction although the company was hopelessly insolvent, they paid themselves out of its

funds $75,000, and "got back what their stock cost them," and still had their original stock left. If they had been the only parties in interest, the corporation might not have complained. But they were not. They misappropriated the funds paid in by the very people who became very much interested, and whom at the time they intended should become interested.

IV.

Yet the Circuit Court of Appeals for the Second Circuit thus speaks of the case:

"But even if it be assumed that this receiver, by thus bringing suit in the name of this corporation by himself as receiver, can maintain an action on its behalf which he could not maintain as receiver only, it is not clear how this assumption would help the plaintiff corporation. It is, in any event, bound by the rules of law regulating the relations of a corporation to its officers, and, between it and its stockholders and directors, by its contract and the acts done in pursuance thereof.

"A creditor, on the other hand, may by appropriate legal proceedings avail himself of every existing legal right against the corporate officers or stockholders. A contract between a corporation and its stockholders, that they should not be called on to pay therefor in full, is good between the corporation and its stockholders. The creditor defrauded by such a transaction may have such contract set aside. . . . So, too, a receiver, if duly authorized to institute such a suit is a representative of all parties interested therein. He is appointed in behalf of all parties who may establish rights in the cause. (Booth vs. Clark, supra.)

"He may, as a representative of creditors, disaffirm acts of the corporation, and sue to set aside transactions entered into in fraud of their rights. . . .

"The complainant is bound by the allegations of the bill and the contention on which it is based, that this is a suit only in the right of the corporation independent of its creditors, and to which neither the receiver nor the creditors are parties.

We are of the opinion that such a suit can not be maintained by this corporation. . . .

"It would seem that inasmuch as it was agreed as part of the contract between the corporation and its stockholders that the stock should be deemed fully paid the stockholder could not be held liable in a suit by the corporation wherein it seeks to annul its contract as a fraud upon the general creditors of the corporation. . . . We have then, in this case, a suit brought in the name of a corporation, wherein it seeks to repudiate, on the ground of fraud, certain contracts made by it with its officers and stockholders, which, so far as the record shows, was lawful in its inception. Whether it could in any case thus disaffirm its contract and seek to recover the fruits thereof without restoring the parties to their original status, it is not material to inquire. (Scovill vs. Thayer, supra.)

"It is clear that it is not the proper party to maintain this suit.

"The corporation was a party to the contract whereby it was agreed that no payment should be required upon said issues of stock. The evidence shows that the bonds could not be floated without a stock bonus, and, there being no stock in the treasury of the company" (*sic*) "the stockholders contracted with said company to sell to the bondholders directly their own stock, pro rata, in order to provide such bonus. . . .

"In stating these conclusions we do not wish to be understood as holding that the transactions complained of may not have been grossly fraudulent, to the prejudice of certain creditors of the corporation; nor do we question the doctrine that the assets of an insolvent corporation are impressed with a trust for the payment of its debts and can not be withdrawn by the stockholders without providing for such debts, as held by the court below. Assuming the facts found by the court below, we think the receiver has misconceived his right and acted beyond the scope of his authority in thus bringing this suit in the name of the corporation." (Rec. 396-399.)

In support of these propositions the Circuit Court of Appeals cites the cases of:

Scovill vs. Thayer, 105 U. S., 143.

Clark vs. Bever, 139 U. S., 96, 111.

Evans vs. Nellis, 187 U. S., 271.
Handley vs. Stutz, 139 U. S., 417.
Coit vs. Gold Amal. Co., 119 U. S., 343.
Hale vs. Allison, 188 U. S., 56.

These cases have no application to the taking of the $75,000.

Scovill vs. Thayer, 105 U. S., 143, decides that there is no obligation on the part of stockholders as between themselves and the company, where an agreement has been made by the company that no further assessments should be made, to pay for the residue of their stock unless it became necessary to satisfy creditors, and that, therefore, the statute of limitations did not run until the necessity for the payment had been ascertained and an authorized demand of payment made.

Clark vs. Bever, 139 U. S., 96, decides that a corporation in good faith may pay its indebtedness, or sell or dispose of its stock in payment of debts to its creditors at less than par.

Evans vs. Nellis, 187 U. S., 271, decides that under the statutes of Kansas as interpreted by the Supreme Court of that state, only the receiver can bring an action to collect the statutory liability of stockholders for the benefit of all creditors against the corporation and all the resident stockholders, and, therefore, such receiver could not maintain an action in a Circuit Court of the United States against an individual stockholder for the amount of the statutory liability.

Handley vs. Stutz, 139 U. S., 417, decides that a stockholder who receives a gratuitous distribution of stock as fully paid, incurs an obligation to pay for it in full, when called upon to do so by creditors whose debts are subsequent to the increase; but that this equity does not exist in favor of a creditor whose debt was contracted prior to such authorization; and further that a corporation in good faith may give stock as a bonus with and in order to sell its bonds.

Coit vs. Gold Amal. Co., 119 U. S., 343, decides that where

shareholders honestly and in good faith pay for their subscription in property in place of money, third persons can not complain; but where there is a gross and obvious overvaluation of property conveyed in consideration of an issue of stock, there is strong evidence of fraud in an action against a stockholder by a creditor to enforce personal liability for his debt.

Hale vs. Allison, 188 U. S., 56, decides that a receiver can not collect the double liability in a foreign jurisdiction under the laws of Minnesota; and also that the liability was one in favor of creditors, with which the corporation had nothing to do; and that the statute did not make the liability assets of the corporation, or confer upon any receiver appointed in a case the right to enforce it, especially without the jurisdiction of the court.

It is submitted that these cases have no real bearing on the case made by the bill and proof. This suit, as to the $75,000 taken, was not one against stockholders to recover unpaid subscriptions to stock or the value of stock which the stockholders in The Great Western Mining & Manufacturing Co. issued to themselves; but was a suit to charge B. D. Harris because he, with others, was a director and officer of the Great Western Mining & Manufacturing Co.; because as such director and officer he stood in a fiduciary relation to the corporation and all interested in it; and by reason thereof could not take a remuneration for stock, which as a director he had agreed to issue as bonus stock to effect a sale of bonds by secretly issuing the stock to himself and turning it back to the corporation at fifty cents on the dollar to supply to purchasers of bonds.

In other words, the company having agreed to sell bonds at eighty-five cents on the dollar with a bonus of stock, the directors and officers of this company could not, pending such negotiations and after the same were closed by contract,

secretly issue to themselves as stockholders the stock so agreed by the corporation to be given as a bonus and then secretly as stockholders go through the form of selling it to themselves as directors, to enable the company to supply bonus stock to the purchasers of the bonds, and thereby take $75,000 of the proceeds of the sale of the bonds from the treasury of the company. The company needed to buy no stock as it had $2,750,000 treasury stock on hand.

They could not under the circumstances even have sold the stock which they legitimately owned in this way, much less that which they took in order to use in this illegitimate way.

Such a transaction was a fraud on the corporation. It was taking the money of the corporation. The money when paid in by the bondholders for their bonds and bonus stock became the money of the corporation and general assets to be used for all purposes of the corporation (Van Weel vs. Winston, 115 U. S., 228, 245). It did not continue to be the money of the bondholders who paid it. They, it is true, were defrauded both as bondholders and stockholders, because the assets of the corporation were depleted and so has every other creditor and stockholder of the corporation been defrauded for the same reason. But the $75,000 taken, if recovered, does not belong to any special class of creditors, but would be general assets of the corporation.

The directors and officers, at the time they made the contract with Elliott, Johnson & Co., to float the bonds at eighty-five cents on the dollar, with a bonus of fifty cents of stock for each dollar of bonds, stood in a fiduciary relation, not only to themselves as the sole stockholders and to the existing creditors of the company, but also to all the subsequent stockholders whom they contemplated bringing in, the purchasers of the bonds, and the future creditors of the company. They were much more than promoters, in reference to whom the

rule as to good faith, secret profits and full disclosure is so strict. They were directors and officers of an existing corporation and promoters of a new loan and issue of bonus stock.

Contrary to what the Circuit Court of Appeals said the company had an authorized capital stock of $3,000,000. It had only issued prior to the inception of the attempt to sell bonds $200,000. It has $2,750,000 of treasury stock on hand when the contract to float this loan was entered into. It had a perfect right, if it were necessary, to enable it to float its bonds, to increase its capital stock to any amount up to $3,000,000, and to issue the stock as fully paid as a bonus to enable it to float its bonds at eighty-five cents on the dollar.

Handley vs. Stutz, 139 U. S., 417, 420, 435.

Dickerman vs. Trust Co., 176 U. S., 202.

This it agreed with Elliott, Johnson & Co. to do by increasing the stock to $350,000 or $400,000. But instead of doing so, these directors and officers "secretly and, therefore, dishonestly," as said in Re Olympia, Ltd., L. R. (1898), 20 Chan. 153, issued to themselves $100,000 of the stock, and then turned it with $50,000 of stock they had issued to themselves in 1888 back to the company at fifty cents on the dollar and under this guise secretly took $75,000 from the treasury of the company.

FOURTH POINT.

The authorities which are in point are conclusive as to the right of the corporation to claim redress for this transaction.

I.

The cases relied upon by the petitioner are not mentioned in the opinion of the United States Circuit Court of Appeals. It may be we are wholly mistaken in their application, but we

submit that they are precisely in point and analogous to the case at bar. They hold, not only that such a proceeding as the one complained of in this suit is a fraud, *but also that the right of action is in the corporation* as representing all interested in the company whether then actually in or intended to be brought in as creditors or stockholders.

In Richardson vs. Green, 133 U. S. 30, this court said, page 43: "Undoubtedly his relation as a director and officer, or as a stockholder of the company, does not preclude him from entering into contracts with it, making loans to it and taking its bonds as collateral security; but courts of equity regard such personal transactions of a party in either of these positions not, perhaps, with distrust, but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the company as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement."

And, again, page 44: "Can the transaction between Richardson and the insolvent corporation of which he was largely the owner and controller, especially with respect to the claim he is urging in this case, stand the test of the fairness and good faith which, as a director and stockholder, he owed to the corporation, its creditors and *bona fide* bondholders?"

In Twin-Lick Oil Co. vs. Marburg, 91 U. S. 587, 588-590, Mr. Justice Miller, delivering the opinion of the court, said, among other things:

Page 588: "That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his case, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others. Koebler vs. Black River Falls Iron Co. 2 Black, 715; Drury vs. Cross, 7 Wall.

299; Luxemburg R. R. Co. vs. Maquay, 25 Beav. 586; The Cumberland Co. vs. Sherman, 30 Barb. 553; 16 Md. 456."

And again, p. 590: "If he should be a sole director, or one of a smaller number vested with certain powers, this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness."

See also Thomas Trustee vs. Brunswick, Fort Kearney & Pacific R. R. Co. et. al, 109 U. S. 522, 524.

Wardell vs. The Union Pacific Railroad Co. 103 U. S. 651.

McGourkey vs. Toledo & Ohio Railway, 146 U. S. 536, 552.

Clark vs. Bever, 139 U. S. 90, 113.

Redmond vs. Dickerson, 9 N. J. Eq. 507, 513.

Hortings vs. Drer, 76 N. Y. 9, 16.

Sawyer vs. Hoag, 17 Wall. 610.

Rothchild vs. Memphis & C. R. Co. 113 Fed. 476, 481.

Wyman vs. Bowman, 127 Fed. 257, 274.

Sutton Mfg. Co. vs. Hutchinson, 64 Fed. 496, 501.

Robison vs. McCracken, 52 Fed. 726, 730.

Jessup vs. Illinois Cent. R. Co. 43 Fed. 483, 503.

(1) London Trust Co., Ltd., vs. Mackenzie, 68 Law Times Rep. 380, illustrates this case.

The directors of a company entered into an agreement with a firm of contractors to do certain work for the company for a specified sum in debentures and fully paid shares of the company, and also made, secretly, certain contemporaneous agreements with the contractors to make over to third parties, without consideration, a certain portion of these debentures and shares. Each of the shareholders and debentureholders who were in the company when this agreement was made took a benefit under one or other of the contemporaneous agree-

ments and all agreed to such disposition of the debentures and shares. The court said:

(Page 384): "The plaintiffs in substance claim a declaration that the defendants are liable to make good to the company the amounts of these appropriations as being in effect a giving away of capital of the company and beyond the powers of the directors.

"The more substantial defenses are two. First, it is said that the arrangement was one to which every one who had an interest either as a shareholder or debentureholder or creditor agreed, that no one was wronged or defrauded and that under the circumstances the case of Re The Gold Mining Co., 11 Ch. Div. 701; Re The Ambrose Lake Tin & Copper Co., 14 Ch. Div. 390, and Re The British Seamless Paper Box Co., 17 Ch. Div. 467, apply and neither the company nor the plaintiff's shareholders could complain.

"But those were all cases of persons who owned the entire capital of the company and intended to remain the sole proprietors, and they were held free to make honest agreements among themselves as to the appropriation of their property, whereas in the present case there was to be a large issue of shares to the contractors which it must have been intended that the public should take up, and there remained a large part of the share capital to be alloted in the future, and the parties to the present agreements were taking for themselves thirty thousand pounds of the company to the detriment of all who might take any such shares and they were doing so secretly and were misrepresenting by the prospectus and registered deed the real nature of the transaction.

"It seems to me the company is entitled to protect the future shareholders and its own funds against such appropriation and that the very cases relied on by the defendants are authorities for this view. 'If,' said James, L. J., in the last cited case, 'they were intending although then constituting the whole company that other people should come in afterwards to whom what had been done would be injurious the court would feel no difficulty in saying as Lord Langdale did in The Society of Practical Knowledge vs. Abbott, 2 Beav., 559, that they intended to commit a fraud.'"

And again,

(Page 385): "Mr. Masterman drew a distinction which does not appear to be tenable. It was *qua* shareholder not *qua* director, he said, that he stipulated for the bonus as a condition of giving his consent. But as director he gave a profit to himself as shareholder and the director must account for it. . . .

"Objections were raised to the right of the plaintiffs to maintain this action. So far as the company is concerned it is for the reasons already given entitled to sue in the interest of those who hold the shares issued to the contractors or to be issued to the public."

(2) Hayward vs. Leeson, 176 Mass., p. 310, covers all the points raised by the defense in this case. In that case directors of a corporation, who, before any capital stock had been issued to the public, caused to be issued to themselves, as a remuneration for their services as promoters and for options on land, by the vote of all persons who then had any interest in the corporation, one third of the whole capital stock and then invited subscriptions to the stock without disclosing that fact, were held: (1) Guilty of a fraud; (2) Liable in a suit in equity (which should in a foreign jurisdiction be brought in the name of the corporation and not in that of the receiver) to account for the net profits received by them; or damages suffered by the company; (3) At the option of the company as it chose to follow the shares or the proceeds thereof or to recover damages; (4) And had no right to demand that the company tender back the lands acquired by it under the options transferred in exchange for the stock.

The court said—in answer to the contentions; that the stock issued was lawfully issued for interest in lands and for services rendered or to be rendered; that there was no fraudulent over-valuation in the issue of the $700,000 shares of stock; that the issue of the stock was voted for by the defendants and others as stockholders, and that stockholders are

under no fiduciary relation to anybody and can do as they will with their own; and moreover that it was consented to by all the stockholders of the East Tennessee Land Company, and, consequently, could not then be made the basis of any complaint by the corporation or anybody else:

(Page 318): "Moreover, it is not sought in these suits, to charge the defendants because they voted as stockholders to issue the $700,000 of stock; but it is sought to charge each defendant because he, with others, was a promoter of the East Tennessee Land Company; because as a promoter he stood in a fiduciary relation to the future shareholders of that corporation, and by reason thereof he could not receive any remuneration for his services as a promoter of that corporation without making a full disclosure thereof, and obtaining the consent of those shareholders thereto." (Citing cases) . . .

(Page 320): " . . . The person to whom the promoters owe the duty which they owe by reason of their fiduciary relation are the persons who put their money into the enterprise at the invitation of the promoters, that is to say, the future stockholders. It is to the future stockholders that the promoters must make the disclosure of the remuneration which is, or is to be, paid to them, and it is the consent of the future stockholders that must be obtained to make that payment valid; if the promoters undertake to make to themselves remuneration for their services as promoters without making a full disclosure of the fact to the future stockholders, their principals, and getting their consent, they are guilty of a fraud."

(Page 326): "Upon substituting the East Tennessee Land Company as plaintiff in place of John K. Hayward, the causes are to stand for hearing as to what the net profits are, which the defendants have respectively received, or as to what the damages are, which the plaintiff has suffered, as the plaintiff shall elect to proceed for the property or its proceeds on the one hand, or for damages on the other hand."

(3) The case of Re The British Seamless Paper Box Co., 17 Ch. Div. 467, was one in which all the owners of shares in the company had allotted to themselves a large amount of

stock without consideration. The company afterwards failed and the attempt was made to hold the stockholders for the shares so allotted.

In addition to what James, Lord Justice, said on page 476, quoted in London Trust Co., Ltd., vs. Mackenzie, ante, Brett, Lord Justice said:

(Page 478): "I agree that if shortly after such a transaction directors admitted new shareholders, it would be strong evidence that they intended at the time to take in new members, and unless all the circumstances are disclosed to them the directors might be made liable for misfeasance because it would be inferred that they intended to act for the future members as well as the present."

And again, Cotton, Lord Justice, said:

(Page 479): "We have not heard counsel on behalf of the respondent but subject to what they may aver I should have said that if this had been an ordinary company in which there was an intention to admit new members and offer the shares to the public, the official liquidator would have been entitled to call on the directors to account for the value of their shares. But on what principle? It is that the directors stand in a fiduciary relation to the whole company, that is, not only to the existing members but to all whom they intend to bring in. A trustee can not make a profit for himself without the full knowledge of all his cestuis que trust, and so the directors of a company formed in the ordinary way stand in a fiduciary relation not only to those who are members at the time, but to all who may come in after." . . .

With reasoning such as this, the court would have had very little difficulty in holding directors liable, for issuing $150,000 of stock to themselves and using it to take $75,000 from the company, under an agreement made with themselves, after they had agreed to sell bonds and issue bonus stock, especially if they never really took the money until long after the bonds and stock had been issued and sold, and the new members were in, and the money was taken from the

proceeds of the very loan which had brought in the new members.

(4) Another English case is that of In Re Anglo French Cooperative Society, L. R. 21 Ch. Div. 492.

In that case the directors paid to a promoter £3,000 for expenses and for the discovery of a plan to float its debentures. The expenses were £400 and there was an understanding between the directors and promoters that the remaining £2,600 should be invested by the promoter in the debentures of the company to be floated. The £3,000 was paid to the promoters who retained £400 for expenses and bought of the company £2,600 of the debentures. The debentures so purchased were then divided according to arrangement between himself and the directors being all the persons interested at the time of the agreement in the company.

It was held that this was a clear misapplication of the £2,600 the funds of the company; that the company could recover the full £2,600 from the directors; that they were jointly and severally liable therefor; that the investment of the money in debentures of the company was not a repayment thereof to the company. Vice Chancellor Hall, who delivered the opinion of the court, said:

(Page 496): "No person who has any management or control of the affairs of a company, or who occupies any fiduciary position in reference to a company can merely because such an agreement has been signed say that such a sum could be allowed as against the company or taken out of its assets.

"The amount itself shows that it was not a proper payment. As has been observed this was a company that was going on. It is not like the case of the British Seamless Paper Box Co., 17 Ch. Div. 467, which has been referred to by Mr. Grosvenor Woods. It is not a case of that kind. The parties were in the position of owing a duty not merely to the persons who were then interested in the company, but to all persons who should afterwards be in the company. It seems to me that this was a clear misapplication of the money of the company."

The decision was affirmed on appeal.

(5) Another case is that of Gluckstein vs. Barnes, L. R. (1900) App. Cas. 240, decided by the House of Lords on appeal from the Court of Appeals where it was reported as Re Olympia Co., Ltd., L. R. (198), 2 Ch. 153.

In that case a secret profit was made by directors and promoters of a company.

In the course of his judgment, Lord Chancellor Halsbury said:

(Page 247): "They were to be sellers to themselves as buyers, and it was a necessary provision to the plan that they were to be both sellers and buyers, and as buyers to get the money to pay for the purchase from the pockets of the deluded shareholders.

"My lords, I decline to discuss the question of disclosure to the company. It is too absurd to suggest that a disclosure to the parties to this transaction is a disclosure to the company of which these directors were the proper guardians and trustees."

Lord Macnaghton said:

(Page 248): "And then comes the last act. Secretly, and therefore dishonestly, they put into their own pockets the difference between the real and pretended price.

"After a brief career the company is ordered to be wound up. In the course of liquidation the trick is discovered. . . .

"Disclosure is not the most appropriate word to use when a person, who plays many parts, announces to himself in one character what he has done and is doing in another. To talk of disclosure to the thing called the company, when as yet there were no shareholders is a mere farce. To the intended shareholders there was no disclosure at all. On them was practiced an elaborate system of deception."

Lord Robertson said:

(Page 257): "The directors of the company are its executive organ; to them its interests are confided and in the present instance the company, even in this its inchoate stage, was identifiable through its executive.

"I hold that from the moment this step was taken the com-

ing directors stood in a fiduciary relation to the company, whose interests were to be in their sole hands. This conclusion rests not on technical rules of law, but on the dictates of fair play embodied in law. The people for whom these gentlemen were bound to act were their coming constituents, the persons out of whose money they proposed to make their gain."

(6) The case as reported below Re Olympia, Ltd., L. R. (1898), 2 Ch. 153, also contains some significant expressions.

Lord Lindley, in the course of his judgment, said:

(Page 167): "What effect then has such a knowledge of such persons on the right of the company to claim the profit thus being made by its directors and promoters out of it? My answer is, none whatever, except to deprive the directors who share in the profits of all possible defense to such claims To say that the knowledge of such persons of their own conduct, which from first to last they were doing all they could to conceal, is to be treated as the knowledge of the company or of the shareholders, is to say that which is opposed not only to common sense, but also to well settled principles of law."

Rigby, L. J., said:

(Page 173): "There never was the slightest intention on the part of any one of the directors to do his duty to the company with reference to the transaction impeached; they were only trying secretly as regards the main bodies of the subscribers for shares to weave a net of legal technicality which might hamper the company in its endeavors to get rid of the fraud attempted to be practiced."

Cotton, L. J., said:

(Page 175): "The corporate entity towards which the duty exists is a thing apart from the seven individuals who for the time being are the only corporators, and the question whether disclosure to them will suffice or not, will depend on whether the constitution of the company is really such that they can be in fact contemplated as exhausting all the persons whom the company is intended to embrace. There may be a company such as is sometimes called a private company or some-

times a one man company where by its very constitution no one is intended to have, and can not be contemplated as being about to acquire, an interest in the company except the signatories themselves. In such cases the fiduciary obligation might not extend beyond such persons: See Salomon's Case, L. R. (1897), App. Cases, p. 22.

"But where, as here, the very pith and marrow of the whole venture is that cash to the extent of one hundred and eighty thousand pounds shall be subscribed by the public for the benefit of the promoters and directors, the duty extends to all the persons who are to be contemplated as about to become purchasers. There is abundant authority for these propositions."

In this connection Cotton, L. J., cited:

Erlanger Case, L. R., 5 Ch. Div. 73, 113, 123.

In Re British Seamless Paper Box Co., 17 Ch. Div. 471, 477-8.

All these cases only apply the principles laid down as far back as Hitchens vs. Congreve (1828), 4 Russ. 562. There are many other English cases to the same effect.

Phosphate Sewage Co. vs. Hartmond, L. R., 5 Ch. Div. 394.

Broderlip vs. Salamon, L. R. (1895), 2 Ch. 323, 329.

Broderlip vs. Salamon, L. R. (1897), App. Cas. 22.

In Re Postage Stamp A. D. Co., L. R. (1892), 3 Ch. 566, 576.

American cases are also not lacking:

Dickerman vs. Northern Trust Co., 176 U. S., 181, 203, 205.

Hoffman Steel & Coal Co. vs. Cumberland C. & I. Co., 16 Md., 456.

Cumberland Coal & I. Co. vs. Sherman, 30 Barb., 553.

It is true some of these cases are promoter cases. Is there any difference between the duties of a promoter and a director except in degree as to full disclosure to those entitled to

know, honest and fair dealing, and secret profits in violation of their trust? Which owes the higher duty to the company? Were not these directors promoters of this loan for the company? Could they secretly issue and sell it stock at a profit to themselves without disclosure? Were they not, as Rigby, J., says, by the agreement of May 3, 1889, never disclosed, "trying to weave a net of legal technicality, which might hamper the company in its endeavor to get rid of this fraud?"

Does it take any imagination to reach the conclusion that, had Elliott, Johnson & Co., and the purchasers of the bonds and bonus stock known, as the undisputed evidence is they did not know, that the directors of the company, who had agreed to sell them bonds at eighty-five cents on the dollar with a stock bonus, intended to take $75,000 or almost one third of the proceeds of the sale to their individual use, they would never have consented to the arrangement? Were not these directors and officers bound to deal fairly and honestly with those they intended to take into the corporation? Did and does not the corporation represent all interested? Was it not the funds of the corporation which were taken?

Could they sell them bonds at eighty-five cents on the dollar with bonus stock, and then secretly reduce the assets of the corporation $75,000 by a private agreement between themselves as stockholders and directors to issue the stock to themselves, to sell "bonus stock"—their stock—to the purchasers of bonds without the latter's knowledge! Were not Elliott, Johnson & Co., and the purchasers from them, entitled to be informed that the stockholders had agreed with the directors to sell stock to them at fifty cents on the dollar and bonds of the company at sixty cents? Did it take any acquaintance with legal principles to apprise the Carlisles and Harrises that they were dealing unfairly with these purchasers, and that they were dealing with

the funds of the corporation as if they were the only parties in interest and in their own interest alone? Was not their failure to disclose the agreement of May 3d, 1889, dishonest? Was not their "secret taking," and therefore in the language of Re Olympia, Ltd., "dishonest taking" of the $75,000 after these stockholders and bondholders had come into the company, a misapplication of its assets? For it is not what the directors said, but what they failed to disclose, which is the gravamen of the complaint.

Indeed it is difficult to see on what theory the transaction can be seriously supported. The burden of proof was upon the defense to show entire good faith in the transaction and the fullest disclosure of all the facts to all who were actually or potentially interested. Instead of that the complainant established by the mouth of an adverse witness and one of the chief participants in the fraud the facts which show a deliberate, long-planned and successfully executed fraud upon those to whom he and his co-directors occupied a fiduciary relation, at a loss to the company of $75,000 of its assets.

II.

The force of some of these authorities is attempted to be overcome by the argument, that they only apply to "prospective original subscribers of stock," and that "future shareholders" means "holders of stock to be issued in the future," and that they have no application to this case, because here the purchasers of the bonds and bonus stock "buys stocks from an existing stockholder" and were not "putting money into the enterprise." Here again the learned counsel hark back to the form of the agreement of May 3d, 1889, and try to plant themselves on the proposition that Elliott, Johnson & Co., and the purchasers from the company of bonds with bonus stock were buying stock from Harris & Carlisle. Again we repeat they bought bonds from the company at 85 cents,

and were to be given *by the company* stock for nothing. That was the contract. The directors by dealing with themselves couldn't make it, another contract to sell their stock to the purchasers of bonds.

The principle behind the cases relied upon by petitioner is that directors can not take an unfair advantage whether promoters and directors of an original company, or directors of a going concern, without perfect good faith and full disclosure to all actually interested or intended at the time to interest in the company, whether as stockholders or bondholders or creditors; that these directors, by a dishonest contract with themselves, did make a sereret profit; that they did not disclose it to these bondholders and stockholders, who they not only then intended to bring in, but had actually contracted to bring in on the basis of their paying $255,000 for bonds, and to be given $150,000 of stock by the company, which should cost them nothing; that these bondholders put—"their money into the enterprise," and because interested as creditors and also as stockholders in ignorance of the stock issues and the contract of May 3, 1889, which it was the duty of the directors to disclose to them before they took the secret profit; that the burden of proof was on the directors to show such disclosure; that not only they failed to show such disclosure but admitted they never made it; and that the corporation whose funds were so taken as representing all interested in the company can recover its funds so taken, from these directors.

It may be that individual bondholders or stockholders may have a cause of action for actual misrepresentations made to them by Carlisle. That is no concern of the plaintiff in this case. It is a suit to recover corporate funds taken by directors dishonestly and to their own profit alone, without the knowledge and consent of all actually or potentially interested in the corporation at the time they took them.

There is no case cited by the respondents which under such circumstances holds that the corporation has no cause of action. If any such case there be, it must be erroneous on principle, because contrary to every instinct "of fair play embodied in law."

The cases relied upon by respondents are like In re Ambrose Lake, etc., Mining Co. L. R. 14, Ch. D. 390, where the persons complained of were alone interested in the company, and *intended to remain the sole proprietors* and were held to be entitled to make honest agreements under such circumstances among themselves; or else they were cases like Foster vs. Seymour, 23 Fed. 65, or Flager Engraving Machine Co. vs. Flager, 19 Fed. 468, where the question was not under the facts involved or if so was not raised.

Thus in Foster vs. Seymour, directors being the only members of the corporation took the whole capital stock as fully paid, in exchange for property as allowed by statutes, and afterwards as stockholders sold it to innocent purchasers. The latter were held not entitled to maintain a suit to compel the directors to account to the corporation *for a fraudulent disposition of its capital stock.*

It did not appear that they at the time intended to bring in others, nor was such a suggestion made. They took no funds of the corporation. They simply valued some property they conveyed to the corporation as representing so much paid-up stock.

The court said: "There was no fraud upon the corporation. At the time the scrip was exchanged for the mining property, the trustees were all there was of the corporation. There were no stockholders unless they were stockholders. What was done was done by the corporation. By the exchange the corporation got the mining property, and gave it back to those from whom it got it, divided into 100,000 shares of the nominal value of $100 each. The Ambrose Lake Tin and Copper Min. Co. (Ex parte Taylor) L. R. 14 Ch. Div. 390; Re Seamless Box Co. F. & R. 17 Ch. Div. 46."

Is that this case? Did the Great Western Mining and Manufacturing Company get any property for its stock? Did it give shares for property at any valuation? It seems it gave up $75,000 for 1,500 shares of its own stock at a time when it had 27,500 shares in its treasury, and the $75,000 was the proceeds of a bond issue at 85 cents on the dollar.

Flager Engraving Machine Co. vs. Flager, 19 Fed. 468, is equally inapplicable.

In that case certain persons were induced to buy stock issued in exchange for property by false and fraudulent representations, the proceeds of which were given to the company. Having gained control of the company they sought through the company to recoup their individual loss from those who had made the representations to them.

The court said, page 470: "The purchasers, some or all of them, may have a right to set aside the sales, and to recover their money of the company or the defendants, or both, but they are necessary parties to the suit or suits, and they can not by obtaining control of the company, set up an artificial case and recover through the company what is really their own loss, from which the company itself was enriched."

Is that this case? Is this case based on the fact that The Great Western Mining & Manufacturing Company "was enriched" by false and fraudulent representations made by it or on its behalf? It would appear on the contrary that the directors secretly took $75,000 of its funds in exchange for $150,000 of its own stock when it had $2,750,000 of such stock in its treasury.

Had the directors issued the stock to the purchasers of bonds instead of issuing it secretly to themselves in 1888 and 1889, and secretly turning it back to the company for $75,000 of its funds, there could have been no complaint that either the funds or stock of the company were misappropriated. Certainly the company would have had $75,000 more

cash, and its capital stock would have been as it is, $350,000.

The other cases cited are equally beside the question. If any reported case has ever decided that a director of a corporation can take its funds without the knowledge and consent of all interested in the corporation, because he makes a secret contract on behalf of the corporation with himself as an individual, which contract is not an honest one, but solely in his own interest, and not in the interest of the corporation, it has not yet been referred to in this case.

If any case holds that under such circumstances the corporation can not maintain a suit to recover the funds so taken it has not been pointed out.

The cases which are relied upon, show that if funds of the corporation have been taken the corporation is the proper party to bring the suit.

FIFTH POINT.

The Estate of B. D. Harris is Liable for the entire $75,000,00 of the Funds of the Company Misappropriated by the Directors.

Judge Wheeler in his opinion in the United States Circuit Court (Rec. 185, 191) proceeded upon the theory that the estate of B. D. Harris, whatever might have been Mr. Harris' personal liability if he had lived, was only liable for part of the amount finally retained by him. Although he retained $22,500.00 the court held that his estate was liable for only $15,000.00, because there had been issued to him contemporaneously with the sale of the bonds only 300 shares of stock of the 450 turned back to the company at fifty cents on the dollar.

The result of this holding was that, as to the other 150 shares which were turned back to the company by R. D. Harris to give to the bondholders as a bonus and for which he received $7,500.00 there was no liability of his estate to refund that amount.

The court seemed to make the right of recovery of the complainant depend entirely upon the issue of the stock to Harris contemporaneously with turning it back to the company.

Had no stock been issued at all by the directors to themselves at that time or during the negotiations with the intent to use it to refund to themselves the $70,000.00 their *bona fide* stock had cost them, and had the stock actually furnished by the directors been stock *bona fide* purchased by them in 1883, the transaction would have been illegal and fraudulent in view of all the facts and circumstances.

Of course, the issue to themselves of $50,000.00 of stock in January, 1888, during the negotiations for the sale of the bonds, and $100,000.00 in April, 1889, after the contract to sell had been made, without consideration enabled them to turn it back to the company for $75,000.00 without diminishing their original holdings. They had left as many shares of stock representing as much value as if $150,000.00 of treasury stock had been issued by the company and given to the purchasers of bonds without any expense to the company or others interested. But the directors would have had no right to have used their original holdings of stock for the purpose of abstracting $75,000.00 of the proceeds of the bond issue from the treasury of the company. The stock was entirely worthless, and even had it had a value, such a secret transaction would nevertheless have been a fraud upon the company and others interested, such as the prospective bondholders and stockholders whom they were inducing to enter into the company. It would not have been an honest bargain in view of the fact that the company needed to buy no stock to fulfill its contract. The issues of stock were incidents of the illegal transaction and while cogent evidence as to the fraudulent scheme devised to abstract the $75,000.00, do not determine the rights of the complainant. So the Harris estate is certainly liable for the $22,500.00 he retained.

As to the remainder of the $75,000.00 divided among the other directors and stockholders, the Circuit Court was of the opinion that as Harris had not personally retained the $52,500.00, his estate was not liable therefor. The liability, however, of the directors was joint and several. (See cases ante.)

The court, it seems to us, overlooked the important consideration that the entire $75,000.00 was taken by the officers and directors of the company from the treasury of the company as a result of their joint action, that each of them was the trustee of all of it and took the whole of it. The fact that they agreed among themselves to give certain parts of it to certain of their number can not militate against the proposition that in the first instance it was a taking of the entire sum by each for which they were jointly and severally liable. As well might it be claimed by the representatives of a thief who had stolen $100.00 and given one half to his accomplice, that he was only liable to account for the $50.00 his estate had actually finally benefited by the transaction.

The court recognized the proposition contended for (Rec. 191; Great West. Min. & Mfg. Co. vs. Harris, 111 Fed. 38, p. 44) when it said:

"If it had all been received by the directors together and divided among themselves, all would probably have been liable together, and each for the whole till all should be recovered; but each received his share separately without connection with the others from the avails of the sales of the bonds that his stock went with. Each may have been liable for the whole loss for neglect of personal duty in not preventing it, but not for the money itself."

The court overlooked in this statement the fact that the $75,000.00 taken was part of the $255,000.00 received for $300,000.00 of bonds; that it was taken as the result of a concerted plan to get out their investment in the stock of $70,000.00; and that, even the agreement of May 3d, 1889,

both in its terms and in its substance, shows that the directors did act together, provided for the division of the money from the sale of the "bonds at the price of 85 per cent. of the par value thereof" and "divided" it among themselves.

It is also charged on the books as a bond expense in one sum of $75,000.00. It was all received by John Carlisle as secretary and treasurer acting for the company, and divided among the directors according to agreement. They finally retained their shares separately, but in the first instance had the $255,000.00 in their possession and under their control as directors and apportioned $75,000.00 of it according to the agreement.

How can it be said that this was done without connection with each other? If directors were ever connected with each other in taking assets of a corporation, these officers and directors it is submitted were so connected and acted together in this case. Having gotten the $75,000.00 in their official capacity, that they chose afterwards to apportion it between themselves can not alter the fact that they, and their estates in the event of their deaths, were jointly and severally liable for the entire amount.

Conceding for the sake of argument that the action is governed as to survivorship by the law of Vermont, under the statutes and decisions of that state Harris' Estate is liable for all the funds he converted as director, whatever he may have done with them afterwards and although he retained only personally $22,500.00.

Thus, in Witters, Receiver, vs. Foster, Administrator, 26 Fed. 737, in an action against a director of a national bank for negligent performance of his duty in not requiring a bond from the cashier and other mismanagement of the affairs of the bank, Wheeler, J., while holding that the action abated by reason of the death of the defendant said:

"The important question is whether the cause of action

survives. This question is to be determined by the law of the state of Vermont, where the bank was situated, and the intestate died. Henshaw vs. Miller, 17 How. 212. The laws of the United States prescribe methods only for reviving suits that do survive, but do not prescribe what suits shall survive. Rev. St., Section 955. The statutes of Vermont applicable to this case provide that actions of trespass and trespass on the case, for damages done to real or personal estate, shall survive. (Rev. Laws, Section 2133.) This statute is not any more broad than the English statutes of 4 Edw. III. c. 7. Barrett vs. Copeland, 20 Vt. 244; Dana vs. Lull, 21 Vt. 383; Bellows vs. Allen, 22 Vt. 108; Winhall vs. Sawyer, 45 Vt. 466; Redfield, J., Manwell vs. Briggs, 17 Vt. 176.

"The ground of the orator's claim against the intestate was his personal and official guilt, not the misappropriation or misapplication of any property of the bank in his possession, not the interference by him with any property of the bank in possession or in action, but the omission of duties, which it performed, might benefit the assets of the bank. In Hambly vs. Trott, Cowp. 372, Lord Mansfield said: 'All private criminal injuries or wrongs, as well as public crimes, are buried with the offender.' There are many cases under such statutes where it is held that actions resting upon such personal wrong-doing, although followed by pecuniary damage, do not survive."

See also:

Boston & Me. R. R. et al. vs. Graves, 80 Fed. 588, 590.

Gt. West. Min. & Mfg. Co. vs. Harris, 96 Fed. 503, 504.

Gt. West. Min. & Mfg. Co. vs. Harris, 111 Fed. 38, 44.

Bellows vs. Allen, 22 Vt. 108.

In Bellows vs. Allen, 22 Vt. 108, a deputy sheriff collected on execution money and detained it, and was sued for not paying it over. It was held the action survived.

In this case the directors received this $75,000.00 in their

fiduciary capacity as part of the proceeds of the sale of the bonds. They had it under their joint direction and control, and each of them was responsible for its custody. They paid it out to themselves under an agreement with each other, and they all did this at the expense of the corporation.

The mistake of respondents and the court below consist in treating the contract the directors made with themselves of May 3d, 1889, without the knowledge of any one, as being a contract with the purchasers of the bonds, and that, therefore, Elliott, Johnson & Co. and other purchasers through them paid to John Carlisle as agent of the stockholders severally $25.00 a share for their stock. This is again the old fallacy of treating the secret contract of May 3d, 1889, which the directors made with themselves as a contract with the purchasers of bonds. It takes two parties to make a contract and act under it. The corporation through Carlisle as secretary and treasurer was dealing with the purchasers. They never dealt with Carlisle as agent of stockholders nor paid him any money as such, and he never received any money in such a capacity.

SIXTH POINT.

The complainant is entitled to interest on its recovery from January 11th, 1890.

The record shows that the $75,000 had been taken from the treasury of the company by January 11th, 1890 (Ex. 98, Rec. 286).

The complainant whether entitled to recover $15,000, $22,500, or $75,000 from Harris' Estate was entitled to interest on the amount from that date.

For some reason not disclosed, either in the opinion or the decree of the United States Circuit Court for the District of Vermont, the court allowed interest only from October 17th, 1901, the date of the handing down of the opinion (Rec. 194).

It is fundamental that interest follows as a matter of course in a case of this sort.

When money has been wrongfully obtained or retained by a party he is liable to account for it with interest from the date it was wrongfully obtained or retained.

Simpson vs. Feltz, 1 McCord Eq. 213.
Rapalje vs. Emory, 1 U. S. (1 Dall) 349.
Hawkins vs. Johnson, 4 Blackf. 21.
Hazard vs. Duke, 64 Ind. 220.
Wood vs. Robbins, 11 Mass. 504.
Jefferson City Sav. Assn. vs. Morrison, 48 Mass. 273.
Holden vs. N. Y. & Erie Bank, 72 N. Y. 286.
Trustees, etc., vs. Lawrence, 11 Paige, 80.
Barr vs. Haselton, 10 Rich. Eq. 53.

SEVENTH POINT.

Equity had jurisdiction of the bill.

It may be that it will be again claimed that the suit is not one of equitable cognizance.

The United States Circuit Court of Appeals ignored this defense. If it is so contended, it is enough to say: (1) The directors occupied a fiduciary capacity and held the funds in trust. (2) The cases heretofore cited were suits in equity against directors for fraud, and to charge them as such for funds or property misappropriated. (2) Briggs vs. Spaulding, 141 U. S. 132, which was a suit simply for negligence of directors of a national bank, was decided by this court and the jurisdiction unquestioned.

The suit at bar was one in which the defendant Harris was charged not only with negligence and mismanagement of the corporation to its damage (which has been abandoned) but with the misappropriation and fraudulent conversion of actual property and assets which came into his hands as an officer and director of the corporation.

National Bank of Commerce vs. Wade, 84 Fed. 10.
Cockerell vs. Cooper, 86 Fed. 7.
Robinson vs. Hall, 43 Fed. 222.

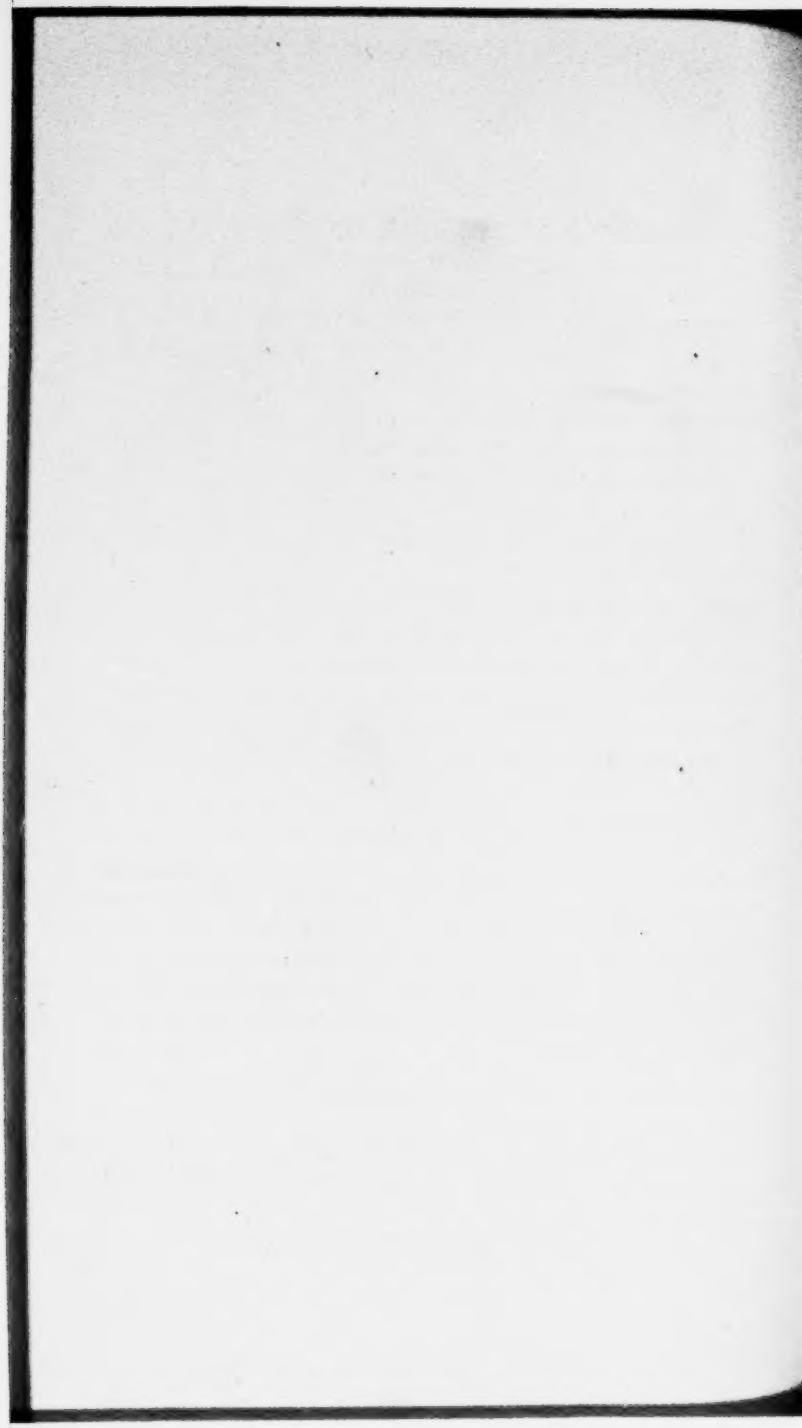
(3) Dykeman vs. Kieney, 154 N. Y. 490, following O'Brien vs. Fitzgerald, 150 N. Y. 572, on which respondents relied, while not agreeing with this court in Briggs vs. Spaulding, as to the jurisdiction in equity of a suit to recover losses sustained by negligent conduct of directors, nevertheless recognize that a suit in equity lies against directors for an accounting as to assets to and of which they had title and possession, and clearly brings out the distinction between a suit in equity by a corporation or its receiver against its delinquent directors, to compel them to account for damages due to a negligent or other tortious act *unattended with profits to such directors*, and one for misappropriation of property of the corporation to their own use. They held that in the former case equity had no jurisdiction, the remedy being at law, that in the latter such jurisdiction did exist.

EIGHTH POINT.

The decree of U. S. Circuit Court of Appeals for the Second Circuit should be reversed, and also the decree of the United States Circuit Court for the District of Vermont, and the cause remanded with directions to enter a decree in favor of petitioner charging defendants with $75,000 with interest from January 11th, 1890.

Respectfully submitted,

HARLAN CLEVELAND,
Of Counsel for Petitioner.



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Supreme Court of the United States

OCTOBER TERM, 1903.

No. 632
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THE GREAT WESTERN MINING AND MANUFACTURING COMPANY, by L. C. BLACK, Receiver,

Petitioner,

against

CHARLES A. HARRIS et al., Executors, &c., of B. D. HARRIS,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

JULIEN T. DAVIES,
BRAINARD TOLLES,
Of Counsel for Respondents.

IN THE

Supreme Court of the United States.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY, by L. C. BLACK, Receiver,
Petitioner,

vs.

CHARLES A. HARRIS *et al.*, Executors, &c., of B. D. HARRIS,
Respondents.

October Term, 1903.

No.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The strength of the petition consists wholly in the erroneous statement of what the Circuit Court of Appeals decided. A reference to the actual decision of that court upon the several matters mentioned in the petition will show that the judgment which the petitioner seeks to have brought into this court for review was the only judgment that could have been rendered, consistently with legal principles established by repeated decisions of this court.

We shall take up the several points of the decision, not in the precise order in which they are presented in the opinion of the Circuit Court of Appeals, but in the order in which they naturally present themselves in connection with the chain of events which led up to the litigation.

I.

THE DISTRIBUTION AMONG THE STOCKHOLDERS OF $100,000 OF ADDITIONAL FULL-PAID STOCK, WITHOUT CONSIDERATION, WAS A TRANSACTION BINDING ON THE CORPORATION AND IMPEACHABLE ONLY BY SUBSEQUENT CREDITORS. AFTER THE INCREASE EACH STOCKHOLDER HAD A GOOD TITLE TO ALL HIS STOCK AS AGAINST THE CORPORATION.

The bill alleges and the proof shows that in 1889 the Great Western Mining and Manufacturing Company, having a capital stock of $250,000, issued $100,000 of additional stock as full paid, and divided the same among its stockholders *pro rata*, without receiving any consideration therefor.

The ostensible reason for the increase, recited in the resolutions, was that permanent improvements to that extent had been made out of earnings. The real reason was to facilitate a division of the stockholders' interest, so that they could dispose of three-sevenths of their equity without introducing inconvenient fractions.

The effect of the transaction was not to increase or diminish the gross assets or the net assets of the corporation, or to change the relative interest in the corporation of any stockholder. The sole effect was to change the manner in which those relative interests were represented, so as to make the same more readily divisible and alienable.

Regarding this transaction the Circuit Court of Appeals said:

> "It would seem that, inasmuch as it was agreed as part of the contract between the corporation and its stockholders that the stock

should be deemed full paid, the stockholder could not be held liable in a suit by the corporation wherein it seeks to annul its contract as a fraud upon the general creditors of the corporation."

Citing:

Hale *vs.* Allinson, 188 U. S., 56.
Coit *vs.* Gold Amalgamating Co., 119 U. S., 343.
Handley *vs.* Stutz, 139 U. S., 417.
Clark *vs.* Bever, 139 U. S., 96.

These decisions are conclusive as to the merits of the case, because they establish the proposition that, notwithstanding the change in the manner in which the stockholders' interests were represented, all the shares of stock, and the proceeds of every share, to the utmost limit to which such proceeds can be traced, were and are the private property of the several shareholders.

II.

THE AGREEMENT BETWEEN THE CORPORATION AND B. D. HARRIS TO SELL CERTAIN PROPERTY OWNED BY THEM IN SEVERALTY, THROUGH A JOINT AGENT, AND TO DIVIDE THE PROCEEDS ON AN AGREED BASIS, WAS A BINDING AND VALID AGREEMENT.

Mr. Harris, in 1889, after the increase last spoken of, was the owner of 1,050 shares of stock of a certain corporation. His title was full and perfect, free from any trust. He had a right to sell them, or any of them, to whom he chose, for such price as he was willing to accept and to apply the entire proceeds to his own use.

The Great Western Mining and Manufacturing Company was at the same time the owner of certain bonds of the same corporation. Its title to these bonds was as good as its title to any other part of its corporate property. It had a right to sell them, or any of them, to whom it chose, for such price as it was willing to accept and to apply the entire proceeds to its corporate purposes.

These several owners became aware that, through some peculiarity of the market for mining securities, the stocks and bonds which they respectively owned and were willing to sell would bring a better price if offered in combination than they would if offered separately. They might have sold their respective holdings to an intermediary who, by combining and readjusting his purchases in a manner more acceptable to the market, might have resold at a profit. In that case no one would think of claiming, as between Harris and the Mining Company, that either had any claim on the consideration received by the other for property over which, in each case, the vendor had the exclusive right of ownership.

Instead of permitting a broker to make a middleman's profit, they agreed to place what they were willing to sell in the hands of a joint agent, to be disposed of for a joint consideration, in the form which the requirements of the market rendered appropriate. They agreed also to divide the consideration on a basis of relative values, the fairness of which is not impeached.

It is true that the stock and bonds which were the subject of this arrangement were stock and bonds of the Great Western Mining and Manufacturing Company. But this, we conceive, does not affect the inherent nature

of the transaction. The equities of the situation were the same, no matter what name was engraved on the certificates.

The Circuit Court of Appeals held that this arrangement was entered into by B. D. Harris in good faith, and that no circumstances of fraud or deception in carrying it out were either alleged or proved. The Court said:

> "Neither the bill filed in the Kentucky Court nor the bill herein charges that any purchaser of bonds or stocks was deceived by said action of the corporation and there is no evidence to that effect."

And again:

> "So far as this defendant's testator is concerned, while there are some expressions in his letters which are capable of being interpreted as evidence of an intent to secure a benefit to himself as stockholder at the expense of the corporation, yet the evidence taken as a whole falls far short of proving that he was a party to any unlawful scheme or believed that the plan which was adopted for floating the bonds and selling his stock was either actively or constructively fraudulent."

The learned Court inadvertently attributed to B. D. Harris certain letters which were not written by him, but by John Carlisle. Mr. Harris' own letters contain the most positive evidence of good faith (Exhibit 98, particularly at pp. 106–111). See, also, the testimony of John Carlisle (Rec., 155).

The ruling which the petitioner apparently expects this Court to make upon these facts is that by receiving from the joint agent the agreed proportion of the joint consideration, B. D. Harris unlawfully took property of the corporation. We might contend, with equal plausibility, that the corporation, by receiving its agreed proportion of the consideration from the joint agent, unlawfully took the property of B. D. Harris.

The petitioner ignores the fact that Harris parted with three-sevenths of his stock interest; that the interest so parted with had a substantial present market value; that the enterprise was a mining venture, involving large and unknown possibilities of loss and gain; that Carlisle handled the stock and bonds and divided the proceeds as a joint agent appointed by express agreement; that the basis of division was fair and equitable; that the transaction was assented to by the predecessors in title of all the existing stockholders, and that no creditor has been heard to complain of it. Brushing aside all these circumstances, which would discourage an ordinary complainant, he attempts to create a cause of action by the plentiful use of italics and invective.

Apparently, if Mr. Harris had parted with his entire interest in the corporation, instead of three-sevenths, the petitioner would be equally ready to claim that the entire proceeds should have gone into the treasury of the corporation.

What the learned Circuit Court of Appeals really held in regard to this claim was not, as stated in the petition, "that no cause of action was vested in the corporation to recover $75,000 of funds of the company, which the directors and officers had secretly and fraudulently abstracted." On the contrary, its ruling is more fairly expressed in the following words, quoted with approval from the opinion of Judge WHEELER. Speaking of shares of stock which belonged to stockholders in their individual right, the learned Judge said:

> "If sold to others, whether it was valuable or not, or at a fair or unfair price, the corporation would not be pecuniarily affected. If it brought 25 cents of the 85 cents on the dollar of the face of the bonds

that the stock and bonds brought, that part would belong to the stockholder furnishing the stock, and not to the corporation; and the receiving of that by the stockholders would not be depleting the assets of the corporation. The bonds would not float at 60. The bonds and stock would at 85. The inference follows that the bonds brought 60 and the stock 25.

The stockholders and directors agreed to this among themselves, each with the others, and that would confirm the division, for, although directors may not contract away to any of themselves more than to others the property of the corporation to the detriment of creditors, they are not precluded from dealing fairly with any of their number in respect to what is his own."

These words were originally used by Judge WHEELER as applying only to a part of the stock, but the Circuit Court of Appeals applied them to all of the stock, holding that all of it was the individual property of the shareholders.

The distinction which Judge WHEELER supposed to exist between the several issues of stock was clearly shown by the Circuit Court of Appeals to be without any rational basis, and the present petitioner does not contend that any such distinction is possible.

III.

THE "FRAUD" WHICH THE PETITIONER ASSUMES WAS COMMITTED ON PURCHASERS OF THE BONDS AND STOCK, IS NOT ALLEGED IN THE BILL NOR ESTABLISHED BY EVIDENCE. THE CORPORATION IS NOT A PROPER PARTY COMPLAINANT TO ASSERT A GRIEVANCE OF THAT KIND.

In order to appreciate the petitioner's argument in regard to the alleged "fraud" it is necessary to understand the status of Elliott, Johnson & Co. in this case. That firm is mentioned twenty-four times in the petition,

while the Court which appointed the receiver is mentioned only twice. It is nevertheless true that in a legal sense the firm of Elliott, Johnson & Co. has no relation to the cause of action.

Elliott, Johnson & Co. are not parties to the suit; they are not mentioned in the bill, nor are they shown to have any legal interest in the corporation. They were merely brokers. They assumed no responsibility (Exhibit 16, p. 36). They bought neither bonds nor stock, nor did they agree to buy any, nor did they guarantee the sale of any (Exhibit 18, p. 37). Their legal status was quite accurately described in the complainant's brief in the Circuit Court of Appeals (p. 107), where he said: "Elliott, Johnson & Co. have nothing to do with this suit."

Of course, if actual purchasers of bonds and stocks were told that the entire amount which they paid was to go into the treasury of the corporation, when in fact a part of the consideration was to go to Elliott, Johnson & Co. and a part to the stockholders whose stock was sold, that would be a fraud. There is no such allegation of fact in the bill, nor is there a word of proof to that effect in the record. It is extremely unlikely that any statement was made to purchasers as to the disposition to be made of the money received. The Court may take judicial knowledge of the well-known fact that such issues of bonds and stock are ordinarily underwritten, and offered to the public for the benefit of the underwriters. Purchasers do not expect to be told how much of the consideration paid enures to the benefit of the corporation. In this case Elliott, Johnson & Co. took all the profits of underwriters

without assuming the risks and responsibilities of such a position (Exhibits 16, 18, pp. 36, 37; Exhibit 114, p. 231). It is not to be supposed that they divulged this state of affairs to their customers.

Upon this feature of the case the rulings of the Circuit Court of Appeals were:

> "This suit cannot be treated as one brought to annul the contract whereby said transaction was carried out by creditors who may have been defrauded thereby. Neither the bill filed in the Kentucky court nor the bill herein charges that any purchaser of bonds or stocks was deceived by said action of the corporation, and there is no evidence to that effect."

And again:

> "It may be that the acts and misrepresentations of Carlisle, the manager of said corporation, or of the brokers through whom the bond transaction was carried out, were in fraud of persons who became creditors upon the strength of such representations, and that an appropriate suit may be brought by such creditors to recover therefor. * * * The complainant is bound by the allegations of the bill, and the contention on which it is based, that this is a suit only in the right of the corporation, independent of its creditors, and to which neither the receiver nor the creditors are parties. We are clear that such a suit cannot be maintained by this corporation. * * * It is clear that it is not the proper party to maintain this suit."

Citing

Foster *vs.* Seymour, 23 Fed. Rep., 65.

Flagler Engraving Machine Co. *vs.* Flagler, 19 Fed. Rep., 468.

To which we take the liberty of adding, as bearing on the possibility of a corporation's founding a cause of action on frauds committed by its own members through the use of its own corporate machinery,

Tompkins *vs.* Sperry, Jones & Co., 96 Md., 560.

In re Ambrose Lake, &c., Mining Co., L. R., 14 Ch. D., 390.

IV.

It appears on the face of the bill that the Great Western Mining and Manufacturing Company is not the real complainant.

From the caption of the bill, the manner in which it was signed and the allegations contained in it, the Circuit Court of Appeals inferred that the moving party in the prosecution of the suit was L. C. Black, Receiver, and not the corporation, which appears as a nominal complainant. That inference is confirmed by the present petition, which plainly states (p. 2) that the suit is brought by L. C. Black, Receiver, "*in the name of the Great Western Mining & Mfg. Co.*" The suit does not purport to be brought by virtue of any authority or title derived directly from the Great Western Mining and Manufacturing Company, but solely by authority of an order of the Circuit Court of the United States for the District of Kentucky (Exhibit 109, p. 198). That order did not in terms authorize the receiver to bring suit outside the territorial jurisdiction of the court which appointed him. The learned Circuit Court of Appeals has held that no such authority can be implied, because it was not within the power of the Circuit Court of the United States for the District of Kentucky to send its officers into the District of Vermont to collect and administer assets of the insolvent corporation having a situs in said district.

This receiver was appointed by a court of equity in the exercise of its general chancery powers. He is a mere arm of the court; he has no title to anything except the name and office of a receiver. There was nothing in the charter

of the corporation which contemplated the exercise of its corporate powers by a court of equity. The corporate "name" was not one of the assets over which the Court had jurisdiction.

The petitioner recognizes the rule which prevented him from exercising his official powers outside the territorial jurisdiction of the court which appointed him. But he makes the mistake of supposing that this was a mere rule of procedure, which could be evaded by a slight change in the form of the bill. In reality, the limitation is inherent in the powers of the court which appointed the receiver. That court cannot enlarge its functions or increase its powers by devising new methods of procedure.

It was said by this Court in *Booth* vs. *Clark*, 17 How., 338, in regard to a receiver of this kind:

> "He has no extra-territorial power of official action; none which the Court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek."

Regarding this statement of the law as it existed in 1854, this Court has recently said:

> "This statement has not been overruled or explained away by any subsequent decision of this Court to which our attention has been called."
>
> Hale *vs.* Allinson, 188 U. S., 56, 68.

These decisions do not place the incapacity of the receiver to sue in a foreign jurisdiction upon the ground that the order of the Court directing such action was not sufficiently explicit. They place it on the ground of a

lack of power in the Court making the appointment. Clearly, if that Court cannot confer such power by direct and express command, it is equally powerless to accomplish substantially the same result by slightly varying its phraseology.

Upon this point the ruling of the learned Circuit Court of Appeals was not, as stated in the petition, that the Circuit Court for the district of Vermont had no jurisdiction of the suit. The ruling actually made is more correctly expressed in the language of the learned Court itself, as follows:

> "But if said Court cannot send such an agent outside of its territorial limits to collect moneys as receiver, its attempt to exercise extra-territorial powers by directing such agent to proceed in the name of the corporation, must be equally futile except where the Court by statute or otherwise is empowered to vest title in the receiver, or where the corporation or the Court, acting within its powers on behalf of the corporation or as the successor of its officers, has authorized such act."

The exception last referred to was doubtless thought necessary in view of the statutes of those states which, in creating corporations, provide for the exercise of corporate powers, in certain contingencies, by a court of equity or through the instrumentality of a receiver. (See the New Jersey Act concerning Corporations [Revision of 1896], Section 68.) When such a provision exists in the charter and consequently becomes part of every contract made by or with the corporation, a question arises which is different from that presented by the appointment of an ordinary chancery receiver. It is not claimed that any such statute exists in Kentucky.

It is respectfully submitted that the point which the petitioner seeks to raise is not a mere question of

the form of procedure. It is a question of the power of the Circuit Court for the District of Kentucky to draw to itself by legal process the administration of assets not within the territorial limits of its jurisdiction. That question has been so recently passed upon by this Court and decided in such unmistakable terms that it does not require reconsideration.

The question is not necessarily involved in this case, because the Circuit Court of Appeals, waiving the objection to the complainant's capacity to sue, has passed on the merits of his claim. Neither is the question directly presented, because the order authorizing the receiver to sue did not expressly authorize him to bring suit outside of Kentucky. In *Hilliker* vs. *Hale*, 117 Fed. Rep., 220, the question was directly presented, because the receiver in that case had been expressly commanded to institute and prosecute actions in foreign jurisdictions.

This Court declined to issue a writ of certiorari in *Hilliker* vs. *Hale* (188 U. S., 739). No reason exists for pursuing a different course in regard to the present petition.

V.

THE CASES RELIED ON BY THE PETITIONER HAVE NO APPLICATION TO THE FACTS OF THE CASE AT BAR.

London Trust Company, Limited, vs. *Mackenzie*, 68 Law Times (N. S.), 380, differs from the case at bar in many particulars, among which we would call attention to the following:

(1) The original transaction was not an honest one as between the directors and the Barbados Water Supply Com-

pany. It was not a case where stockholders submitted to a diminution of their relative interest in a going concern, in consideration of receiving a part of the price obtained upon the transfer of that interest to others.

On the contrary, it was the case of an out-and-out gift of debentures and stock, unequally distributed, so that the directors got the largest shares. Any dissenting stockholder could have had an injunction to stop it. It was defended only on the alleged ground that all persons who were at the time interested in the company had knowledge of it and approved it. The Court said (p. 384):

> "The directors gave away the company's money to pay in full a debt which did not exist, and there was not any compromise."

In the case at bar the transaction between Harris and the corporation was one of which no dissenting stockholder could have complained, provided the gross consideration received was equitably apportioned. Harris got only the fair value of what he gave up, which was three-sevenths of his proportionate interest in the corporation. He could have compelled the corporation either to give back his stock or to pay him his agreed share of the gross price, and no court would have denied him relief.

(2) In the Barbados Water Supply case it was not true in point of fact that all persons interested in the company had kn[illegible]edge of the transaction and approved it. The Court said (p. 385):

> "No doubt most of the holders of shares or debentures existing at the date of the agreements had more or less knowledge of the general purpose of the scheme, but it is not proved that all had such knowledge. No circular explaining the matter was issued, nor was any general meeting called, nor does a mere general knowlege of and assent to the principles of the scheme involve knowledge of the benefit which the directors were to take."

(3) The Barbados Water Supply Company was allowed to disaffirm the transaction because it was *ultra vires* and because the directors took a secret and disproportionate benefit thereunder. Neither of these grounds is alleged to exist in the case at bar.

(4) The Court held that the corporation might disaffirm the transaction in the interest of the future holders of shares in its treasury which had never been issued, but which it was intended to issue to the public for cash. There are no such shares in the treasury of the Great Western Mining and Manufacturing Company.

(5) In so far as the case holds that a transaction of the kind above described can be impeached by a stockholder who gets his stock by purchase from one of the parties to the transaction, it stands alone among the English decisions and is contrary to the uniform current of authority in this country and to the principle of equity expressed in the 94th rule of this Court.

Foster *vs.* Seymour, 23 Fed. Rep., 65.

Venner *vs.* Atchison, &c., R. Co., 28 Fed. Rep.,581. 591.

United Elect. Securities Co. *vs.* Louisiana Elect. Light Co., 68 Fed. Rep., 673, 675.

Symmes *vs.* Union Trust Co., 60 Fed. Rep., 830.

Wood *vs.* Corry, &c., Co., 44 Fed. Rep., 146.

Flagler, &c., Co. *vs.* Flagler, 19 Fed. Rep., 468.

Re Syracuse, &c., R. Co., 91 N. Y., 1.

Kent *vs.* Quicksilver Mining Co., 78 N. Y., 186, 188.

Barr *vs.* N. Y., &c., R. Co., 125 N. Y., 263, 273.

Hollins *vs.* St. Paul, &c., R. Co., 9 N. Y. Supp., 909.

Parsons *vs.* Hayes, 14 Abb., N. C., 419, 433.

Nott *vs.* Clews, 14 Abb., N. C., 437.

Drake *vs.* New York Suburban Water Co., 26 App. Div., 499.

Cook on Corporations (5th ed'n), §§ 40, 730.

Hayward vs. *Leeson*, 176 Mass., 310, and the other cases which follow it in the course of the petitioner's argument involve the question of the duty of promoters and directors towards future holders of the unissued stock of the corporation. These cases are irrelevant because the Great Western Mining and Manufacturing Company at the time of the transaction in question was not inviting the public to subscribe to its stock and it is not now likely that it will ever extend such an invitation.

The petitioner quotes the words "future stockholders" from these decisions as though they meant the successors in interest of the existing stockholders. What the phrase really means in this connection is, holders of stock that is to be issued in the future. All these decisions hold (and none more clearly than *Hayward* vs. *Leeson*) that after the stock which is intended to be offered to the public has been fully subscribed, then by unanimous consent of all the subscribers the promoters may receive any profit that may be agreed upon. This implies a power in the registered stockholders, *at that time*, to bind their successors in interest by such consent. If each stockholder gets this power as soon as the stock is

fully issued, there is no reason why he should not retain it so long as he continues to be a stockholder.

In *Hayward* vs. *Leeson* the Court puts this matter very plainly at page 320:

> "The persons to whom the the promoters owe the duty which they owe by reason of their fiduciary relation are the persons who put their money into the enterprise at the invitation of the promoters, that is to say, the future stockholders."

A man who buys stock from an existing stockholder has no reason to believe and of course does not believe that he is "putting money into the enterprise." He knows perfectly well that he is putting money into the pocket of the man from whom he bought the stock. A man who buys stock without asking or knowing from whom he buys it, certainly cannot complain of deception whether it turns out that the purchase is made from a former holder of the shares or from the company itself.

It would be most absurd to imagine a fiduciary relation between each stockholder and all his successors in title. That would mean that a stockholder must always be guilty of a breach of trust if he waives any part of his strict legal right by consenting to anything from which he could possibly dissent. A corporation conducted on that principle would not be likely to weather many financial storms.

The relation which a stockholder occupies toward one to whom he sells stock is not a fiduciary relation, but the ordinary relation of vendor and purchaser. Both relations require good faith and both exclude fraud. Here the resemblance ceases and no good purpose is to be served by confusing relations that are essentially distinct.

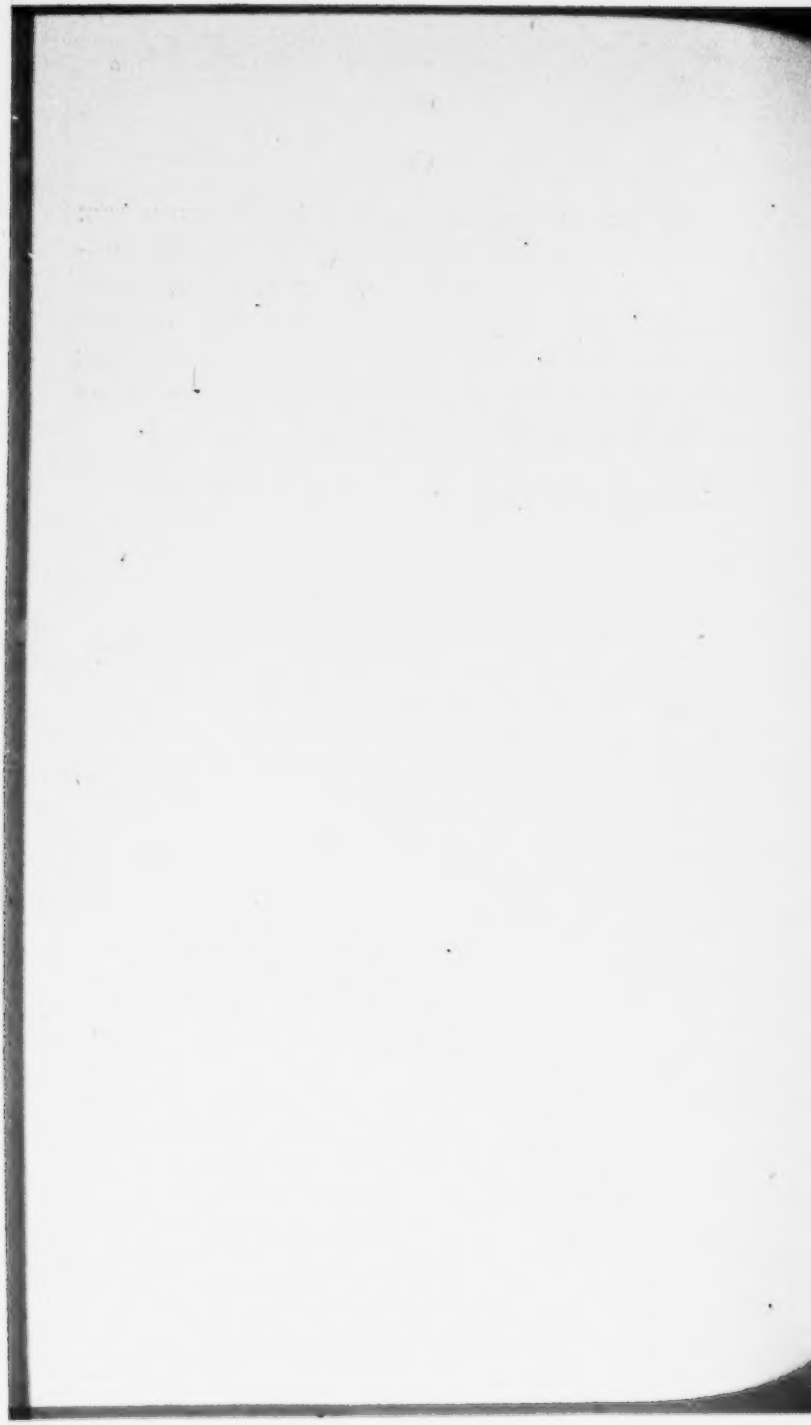
The petitioner calls attention to the fact that in *Hayward* vs. *Leeson* the Court gave leave to substitute the East Tennessee Land Company as plaintiff, in place of the receiver. From this the petitioner infers that the Court intended to sanction a continuation of the suit by the receiver in the name of the corporation, without any other authority than that given by the order of the Court which appointed him. We do not so understand the judgment. In holding that the East Tennessee Land Company had title to the cause of action sued upon and in requiring it to be substituted as plaintiff, the Court clearly required that it should become the real complainant, should control the suit and receive the proceeds, subject to the power of any court of competent jurisdiction to which application might be made in the meantime to provide for the custody and administration of such proceeds by an ancillary receivership. The petitioner has no warrant for assuming that the Court would have been satisfied with an evasive compliance with its decree. What the judgment manifestly required was that the real owner of the cause of action should make an actual appearance in the suit, so that the Court should have jurisdiction over it, *in personam*.

VI.

MANY STRONG REASONS EXIST FOR SUSTAINING THE JUDGMENT WHICH ARE NOT REFERRED TO IN THE OPINION OF THE CIRCUIT COURT OF APPEALS. WITHOUT DISCUSSING THESE WE SUBMIT THAT, FOR THE REASONS WHICH APPEAR ON THE FACE OF THE OPINION, THE JUDGMENT IS MANIFESTLY RIGHT AND THE PRAYER OF THE PETITION SHOULD BE DENIED.

Dated April 4, 1904.

JULIEN T. DAVIES,
BRAINARD TOLLES,
Of Counsel for Respondents.



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APR 11 1905
JAMES H. McKENNEY

Supreme Court of the United States

Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

OCTOBER TERM, 1904.

No. 217.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY, by L. C. BLACK, its Receiver,

Petitioner,

against

CHARLES A. HARRIS *et al*, Executors of B. D. HARRIS, deceased,

Respondents.

BRIEF FOR RESPONDENTS.

JULIEN T. DAVIES,
BRAINARD TOLLES,
Of Counsel.

Supreme Court of the United States.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

THE GREAT WESTERN MINING AND MANUFACTURING COMPANY, by L. C. BLACK, its Receiver,

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CHARLES A. HARRIS *et al.*, Executors of B. D. Harris, deceased,

Respondents.

October Term, 1904. No. 217.

BRIEF FOR RESPONDENTS.

This suit in equity was begun in 1895, in the Circuit Court of the United States for the District of Vermont, by L. C. Black, a receiver of all the property and assets of The Great Western Mining and Manufacturing Company, appointed as such by the Circuit Court of the United States for the District of Kentucky (Rec., 1, 7). The suit was brought by the receiver in the name of the corporation under the supposed authority of an order of the Circuit Court for the District of Kentucky (Rec., 7, 366). The object of the suit was to obtain certain relief as set forth in the bill against B. D. Harris, a former director

and stockholder (Rec., 2, 3). B. D. Harris died in 1899, and the suit was revived against his executrix and executors, the present defendants (Rec., 32). The Circuit Court gave judgment against the defendants for $15,000 and costs (Rec., 194). Both parties appealed (Rec., 195, 202), and the Circuit Court of Appeals reversed the judgment in favor of complainant and dismissed the bill (Rec., 401).

The Great Western Mining and Manufacturing Company was incorporated by a special act of the General Assembly of Kentucky, approved January 19, 1856 (Rec., 297). A right was reserved to amend or repeal "for a violation of the rights and powers herein granted"; but it does not appear from the record that such power was ever exercised or that any occasion for its exercise ever arose or that the corporation ever accepted the present Constitution of Kentucky. The law applicable to its corporate affairs is therefore to be found in the act of incorporation and in the general laws of Kentucky in force at the time of its enactment.

Organization and Early History.

The corporation was duly organized in accordance with the charter on July 7th, 1858 (Rec., 297), and one thousand shares of its capital stock were subscribed and paid for (Rec., 299). The authorized capital was three millions of dollars, divided into thirty thousand shares of one hundred dollars each (Rec., 297). The company at once engaged in the business of mining and selling coal at or near Peach Orchard, Ky. (Rec., 299), and was continuously engaged in that business for several years. At some time prior to 1865, the working of the mines was dis-

continued, but it was renewed in 1881, new mines were opened, a railroad was constructed and important improvements were made at an expense of over $100,000 (Rec. 66, 159, 322). The directors' minutes from July 7th, 1858, to May 27th, 1893, are set forth in full in the Record (pages 297 to 364). John Carlisle was a director of the company during its entire existence, and was Secretary from October, 1863, to the end.

In 1863 negotiations took place in respect to a proposed sale of all the stock of the corporation. The transaction was conducted as though it were a corporate transaction, and by a resolution of the Board of Directors passed November 2, 1863, it was provided that "a decision of a majority of the stock as to what is satisfactory security shall be binding upon all" (Rec., 302). On the following day the directors, having obtained a more correct knowledge of the nature of corporate stock, passed a resolution as follows (Rec., 302):

> "*Resolved*, That notwithstanding the resolution of the 2d inst. is that a majority of the stock shall determine the security offered by the buyer; that in the settlement with the buyer each individual stockholder shall use his own pleasure and judgment and that the settlement with the buyer shall be with the owners of the stock respectively, and the stockholders in the aggregate shall not be governed by the individual action of each stockholder."

The proposed sale was not carried into effect, and the property continued to be managed by the original incorporators and their associates until 1883. From time to time additional stock was issued for various reasons and considerations (Rec., 301, 302, 306, 307), until in February, 1874, $245,000 of stock was outstanding (Rec., 309). By resolution adopted April 1, 1874, Messrs. Daniel Mc-

Laren and Stanley Matthews were released from their subscriptions, reducing the stock to $185,000 (Rec., 310). The directors made an attempt to reduce the capital stock still further by calling in all the shares and issuing new certificates for one-third the amount of the old ones (Rec., 311), but the resolution passed to this end was apparently never carried into effect. At a meeting of stockholders held March 25, 1882, a resolution was adopted as follows (Rec., 328):

> "Whereas, the board of directors have passed a resolution recommending that one hundred and fifty shares of paid-up stock of this company be issued and delivered to John Carlisle for his services in taking care of the property for the last seventeen years, which resolution meets the approval of the stockholders; therefore
>
> *Resolved*, By the stockholders of the Great Western Mining and Manufacturing Company, that the directors of said company are hereby authorized and requested to issue and deliver to said John Carlisle one hundred and fifty shares of the capital stock of this company, paid up in full, in consideration for his services rendered the company in caring for the property in the past seventeen years."

At the stockholders' meeting held March 20, 1883, the record shows (R., 330):

> "Mr. Richardson, the superintendent, reported that the mines were now in working order, all the necessary improvements being completed, and that he was shipping 200 tons of coal daily. In order to do a profitable business the working capital should be largely increased, so that more houses could be erected and other mines opened. An output of 1,000 tons daily would increase a net profit to the company of $45,000 per year.
>
> A committee, consisting of the president and secretary, were requested to get the signatures of the stockholders to an agreement to reduce the capital stock one-half, so as to provide by the selling of the relinquished stock sufficient working capital to mine on a large scale."

About this time extensive development work was being

carried forward and improvements made, principally with moneys advanced by John Carlisle (Rec., 331). The minutes of the directors' meeting of August 27, 1883, show (Rec., 334):

> "No reports for July were received, but the June report of mining was read and some disappointment expressed that there was still a loss, which Mr. Carlisle explained was necessary so long as the output of coal was not increased, and that could not be done without a further increase of working capital, and he referred to his report of March, 1882."

The minutes of the meeting of October 22, 1883, show (Rec., 335):

> "Reports of operations of the mines for July, August and September were read. Still losing money. All members of the board except G. W. Carlisle and John Carlisle, declined to advance any more money for working the mines.
>
> The secretary reported that he had been unable to induce any one to discount the note for $7,000, authorized at the last meeting, and that he had been compelled to pay the note due September 17th out of his private funds. No one volunteered to share the burden with the secretary."

B. D. Harris' Connection with the Company.

In the following month John Carlisle succeeded in interesting B. D. Harris and G. D. Harris in this company. The way in which it came about is described by John Carlisle as follows (Rec., 57):

> "The original company was composed of R. B. Bowler, Larz Anderson, George K. Schoenberger, George Carlisle and others. After my father's death (the death of George Carlisle) his interest passed to his two sons; after Mr. Bowler's death his interest was represented by his sons; after the railroad was constructed to Peach Orchard it was found impossible to secure the assent of Mr. Anderson, Mr. Schoenberger and the Bowler heirs to furnish the capital necessary to put the mines in operation except to a limited degree. I had furnished myself the bulk of the cost of putting the mines in condition to

operate, and I had been compelled to become responsible to the gentlemen named before for the moneys that they put up. The majority of the stockholders in 1883 were willing to sell out their stock, and I then induced B. D. Harris and his brother to purchase the stock owned by Larz Anderson, George K. Schoenberger and the Bowler heirs."

And at page 59 of the Record:

"I couldn't state how much they bought except from the records; the amount they paid for it was, I think, $30 a share, but I am not positive."

The stock transfer book shows six hundred shares issued to B. D. Harris, November 18, 1883, and the same amount to G. D. Harris on the same day (Rec., 220). The actual delivery of stock probably took place on November 15, 1883, because on that day Messrs. B. D. Harris, G. D. Harris and James C. Holden were elected directors to fill vacancies. B. D. Harris was elected president. At the same meeting the directors authorized an issue of $60,000 of seven per cent. first mortgage bonds (Rec., 336). At a meeting held April 24, 1884, the president and treasurer were authorized to raise $30,000 by selling or pledging a like amount of said bonds "for the purpose of procuring additional plant and improvements, including mining machines, so as to increase the production of the mines" (Rec., 339).

Of these first mortgage bonds, $21,000 were purchased by B. D. Harris, $1,000 by J. C. Holden, $10,000 by John Carlisle, $15,000 were accepted as collateral for a loan of like amount by the Cheshire Savings Bank, $5,000 were accepted as collateral for a loan by O. C. Phelps, and $8,000 were retained for working capital (Rec., 270, 271).

By the aid of this new money, the working of the mine

became profitable. Net earnings, dividends and interest from 1884 to 1889 inclusive were as follows (Rec., 295, 345 and 209 to 212):

	NET EARNINGS.	INTEREST.	DIVIDENDS.
1884	$8,603.09	.....	
1885.....	4,503.19	$4,612.29	$4,000
1886.....	6,021.81	3,490.00	
1887	21,579.67	3,490.00	
1888.....	30,610.95	6,536.99	4,500
1889 (1st six months).	18,999.98	3,900.00	6,000
	$90,318.69	$22,029.28	$14,500

At least $8,000 of the interest is properly chargeable to construction account. Deducting the remainder, the surplus on July 1, 1889, was $61,789.37.

These are the figures as finally given by John Carlisle, corrected to conform to the directors' minutes in the matter of dividends. During this period B. D. Harris was president of the company. He resided at Brattleboro, Vt. He usually attended the annual meetings of stockholders and the directors' meeting held on the same day; but seldom attended any other meetings. The management of the affairs of the company was practically left to John Carlisle, assisted by the vice-president, Mr. Richardson. At a meeting held May 5, 1887, at which B. D. Harris was present, the record shows (Rec., 343, 344):

> "The vice-president recommended that new mines be opened on Nats Ck., where the coal showed excellently, both in quality and thickness. Upon motion the recommendation was accepted and approved, and the vice-president was directed to open the new mines, the expense of which should be provided for out of the earnings of the company."

At a meeting held November 10, 1887, at which B. D. Harris was present, the record shows (Rec., 344):

"The secretary and treasurer reported that the business at the mines was unusually good, and that owing to the long drouth and the unsurpassed facilities for supplying the markets with Peach Orchard coal by rail from the company's mines, that the profits had largely increased and the only thing lacking was sufficient capital to enable the company to increase the output enough to meet the demands. He also reported that a large amount had been expended this year for permanent improvements out of the earnings of the company, the total for the past three years amounting to over $50,000.

On motion of Mr. G. D. Harris, the president and secretary were authorized to call a meeting of the stockholders on January 11th, at Cincinnati, for the purpose of voting on an increase of the capital stock to the amount of $50,000, to be divided *pro rata* among the stockholders, being the amount of net earnings expended in permanent improvements."

Increase of Stock in 1888.

At the special meeting held pursuant to this resolution, B. D. Harris and G. D. Harris were represented by proxy and the following preamble and resolutions were adopted unanimously, 1990 shares voting (Rec. 344):

"Whereas, there has been expended for permanent improvement and betterments, including barges, flats, opening of new mines, machinery, &c., during the past three years, the amount of $64,666.44, all of which sum has been furnished from the net earnings of this company.

Resolved, that the stockholders being entitled to this amount, the president and secretary are authorized and directed to issue five hundred shares of stock of this company, to be divided *pro rata* among the stockholders of this company as follows:

To B. D. Harris, one hundred and fifty shares.
To G. D. Harris, one hundred and fifty shares.
To John Carlisle, one hundred and ten shares.
To G. W. Carlisle, seventy-five shares.
To George S. Richardson, thirteen shares.
To James C. Holden, one share.
To L. Hinsdale, one share."

At a meeting of the directors held on the same day, stock was directed to be issued accordingly and the directors also voted to begin paying regular quarterly dividends at the rate of three-quarters of one per cent. on the capital stock (Rec., 345).

In accordance with the above-quoted resolution 150 shares of stock were issued to B. D. Harris, Jan. 14, 1888, represented by certificate No. 36 (Rec., 221). All this stock was transferred out of the name of B. D. Harris prior to December 10, 1889 (Rec., 221). Corresponding amounts of stock were issued to all the other stockholders, *pro rata*, according to the terms of the resolution.

Efforts to Obtain Additional Capital.

At a directors' meeting following the annual meeting of stockholders on April 26, 1888, the minutes show (Rec., 347):

> "The president and secretary were appointed a committee to prepare a plan for securing additional capital in order to increase the business of the company."

During the Summer of 1888 John Carlisle entered into negotiations with a man named Vernon in regard to the sale of bonds (Rec., 126, 138). Mr. Vernon prepared a statement "in order to bring it properly before the public" (Rec.,138), and it was in regard to Mr. Vernon's plan, the details of which are not shown in the record, that John Carlisle wrote his letter of August 11, 1888, copied in the record at page 125:

> "Hon. B. D. HARRIS—Dear Sir: As I wrote you from New York, Mr. Vernon and I hurriedly prepared a new statement which he had typewritten and forwarded to me to-day. Mr. Tyler and I went over the statement you sent, together with Mr. Vernon, and made several alterations on the latter. I return herewith both to you for you to

criticise, fix up, and send to Mr. Vernon. You will have them typewritten for us. Mr. Tyler is of the opinion the words 'necessary expenses and outlays' will cover, as he expresses it, 'a multitude of sins' and enable us to use the money received from sale of bonds, that is, what is left over and above paying the debts, and working capital, &c."

It seems probable that in reading or copying this letter an error has occurred and that the word "and" before "working capital" should read "for." Otherwise the sentence is incomplete and the "&c." is meaningless. If John Carlisle meant to say that Mr. Vernon's plan, as formulated by Mr. Tyler, contemplated the appropriation by the stockholders of a part of the proceeds of a sale of bonds, without giving up anything of value therefor, then of course it was essential to the legality of the plan, as against existing creditors, that the amount so to be appropriated should be limited to the surplus earnings available for distribution. Whatever the meaning of the letter may be, the Vernon plan cannot be taken to represent the sentiments of B. D. Harris. He never approved or encouraged it in any way, but, on the contrary, the record shows (page 126, foot): "Mr. Harris, the president of the company, strongly objected to have Mr. Vernon to do anything in relation to the bonds," and at page 138:

"He did prepare such statement, which I sent to Mr. Harris, who did not approve of it."

Later, Mr. Carlisle had conferences with other parties in the east in regard to floating an issue of bonds so as to net the company 60 or 65 cents on the dollar (Rec., 118). These negotiations were without success (Rec., 102, 117, 347). Mr. Harris himself took no part in any of these negotiations (Rec., 112).

Negotiations with Elliott, Johnson & Co.

In February, 1889, John Carlisle took up the question of obtaining a loan on a new issue of bonds, with the president of the Penn Mutual Life Insurance Company, of Philadelphia (Rec., 271). The president of the insurance company, deeming the matter better suited to private investors, introduced him to a member of the firm of Elliott, Johnson & Co., of Wilmington, Delaware, bankers and dealers in investment securities (Rec., 19). The date of the meeting with Elliott, Johnson & Co. must have been subsequent to February 27, 1889 (Rec., 271), and prior to March 16, 1889 (Rec., 254).

Prior to this meeting and as early as January 15, 1889, steps had been taken toward a further increase of capital stock. At a directors' meeting held on that date, at which Mr. Harris was not present, the record shows (Rec., 347):

> "It appearing that the item of construction acc. shows over $150,000 having been paid for improvments and betterments from the net earnings of the company, which amount properly belongs to the stockholders of this company, it was, upon motion of Mr. Hinsdale,
>
> *Resolved*, that the attention of the stockholders, at the next annual meeting, be called to the fact of such appropriation of the net earnings, with the request that they instruct the board what action to take."

The negotiations with Elliott, Johnson & Co., passed through two stages. In the first, John Carlisle sought to enlist their services as brokers for the sale of bonds only. Concerning these early negotiations Mr. Scott testified (Rec., 19, 20, 21):

> "Mr. Carlisle told me of the assets and prospects and financial condition of the Great Western Mining and Manufacturing Company; that it had a mortgage debt of $60,000, if I remember correctly, and some floating debt and that he wanted to raise a considerable larger

sum the balance of the money to be used in the furnishing of additional facilities for mining of coal and extending of their business. * * * The matter attracted us. It seemed to be a property of considerable value, from the data which he gave us, and the coal of good quality with a market considerably larger than their output. * * * He furnished us with many letters from people in the Cincinnati locality who were using the coal, of the tenor that it was a steaming coal of rare quality and that if they could get larger amounts of it they would be glad to do so, showing a market for a very much larger output than the company had at any time it was presented to us."

During this period letters were received from Elliott, Johnson & Co., which, though not encouraging, contained a gleam of hope (Rec., 272). Finally, on April 5, 1889, they wrote (Rec., 236):

"We are disposed to take up your matter and offer your bonds to our customers, and believe if we do so we will succeed in placing them. If we agree to do so providing our expert's examination is satisfactory, will you put the matter in our hands, absolutely, to handle, and take $255,000 less 2½ per cent. for the $300,000 bonds?"

Immediately after receiving this letter Mr. Carlisle came East (Rec., 273). Then began the second stage of the negotiations as described in Mr. Carlisle's letter to B. D. Harris, of April 13, 1889 (Rec., 273):

"In my hurried letter yesterday, I do not know that I made matters plain. It is this: Messrs. Elliott, Johnson & Co., about one year since placed, with the aid of Messrs. Fisk, Hatch & Co., of N. Y., the bonds of the Shawnee Coal Co. of this State, who are mining 2,000 tons per day. The bonds were sold at a discount but were sugared with an even amount of stock—dollar for dollar.

They were confident if we would agree to this that they alone could float the loan. That would mean doubling our stock, to which I strongly objected. At last I agreed, subject to your approval, to increase the capital stock to $350,000 or $400,000 and give $150,000 of stock with the bonds."

Mr. Scott's version of the interview referred to in this letter was as follows (Rec., 20):

"The result of the negotiations was a proposition which we made

to him that we would attempt to dispose of bonds to the amount of three hundred thousand dollars, provided they were accompanied with fifty per cent. or one hundred and fifty thousand dollars worth of stock * * * we stating to Mr. Carlisle that, in our judgment, bonds on a coal company could not be floated among our clients unless accompanied with a stock bonus, and we finally suggested and they agreed to furnish one hundred and fifty thousand dollars of stock with the three hundred thousand dollars of bonds."

On April 17, 1889, Elliott, Johnson & Co., wrote (Rec., 233):

"We have not been able to interest Hatch & Foote, but feel that we can sell the bonds per Smally and with our connections and are ready to go ahead. We will not assume any responsibility, such as by purchasing or guaranteeing to float them, merely to issue them over our name provided developments are satisfactory."

On the following day, evidently in response to a request for written statement of their proposition, they wrote (Rec., 233):

"We wrote you yesterday, which will cover what you request, but now restate that our plan is to undertake to float your bonds, provided the further examinations, legal and engineering, are favorable, without assuming any responsibility, so that the bonds, with 50 per cent. of the Great Western Mining and Manufacturing Company's capital stock, as a bonus, will net you 85 per cent."

During the progress of these negotiations the reports made to Mr. Harris by John Carlisle were of the most general nature (Rec., 272 to 274). John Carlisle had the negotiations entirely in his own hands (Rec., 112). Mr. Harris himself never met Elliott, Johnson & Co. until the contract for their services as brokers had been made, and then the conversation was of a general nature (Rec., 21). The above-mentioned letters were apparently shown to Mr. Harris when he went west to attend the annual meeting, about April 20, 1889, as is evident from a letter

written to Elliott Johnson & Co. by John Carlisle under date of April 21, 1889 (Rec., 257):

"Mr. B. D. Harris, our president, arrived last night. I read him your letters, and he assents to your propositions with this understanding, that you receive subscriptions for the bonds, but none to be delivered unless all are subscribed for within a certain period. How long should the time be for the receiving of subscriptions? I enclose copy of resolution relating to issue of additional stock."

In response to this Elliott, Johnson & Co. wrote on April 24, 1889 (Rec., 234):

"The utmost we can do is to agree to float the bonds as rapidly as possible, using our best endeavours. We cannot agree to undertake to name a specific time within which we will agree to sell them, neither do we see our way clear to attempt to take subscriptions for them. * * * Neither can we go ahead with advantage until we get the physical report, as we rely in a great measure upon it to make sales. However, in the meantime we will do some talking. Please mail us a definite acceptance of our terms, giving us absolute control of the matter and putting it in such shape as will constitute our authority."

Pursuant to such request John Carlisle wrote on April 27, 1889, as follows (Rec., 258):

"At a meeting of the directors of the Great Western Mining and Manufacturing Company, held on the 22d inst., your proposition embodied in your letter of the 18th inst., undertaking to float the bonds of this company so that the same should net the company 85 per cent. of the par value thereof, providing 50 per cent. of the par value of the bonds in the stock of the company should also be transferred with said bonds; and also provided that the results of further examination are favorable was presented and accepted, and the secretary was directed to notify you of such action of the directors.

This gives you the exclusive authority to negotiate the sale of the bonds of the company."

The minutes of the directors' meeting of April 22d show no such resolution as is mentioned in the above-quoted letter, but do show the following (Rec., 351):

"Resolved, that the president and secretary of the company shall

arrange for the sale of the three hundred (300) bonds aforesaid, in their discretion at the best price obtainable; and the proceeds thereof shall be applied to the cancellation and retirement of sixty (60) first mortgage seven per cent. bonds, dated January 1, 1884, now outstanding; also to the payment of all floating indebtedness incurred up to date hereof, for material and construction; and the balance shall be used by the directors for the best interest of the company."

From this it is evident that John Carlisle, at the time of writing his letter of April 27, 1889, had no authority to give away stock belonging to the stockholders, individually, or to bind the company or the stockholders by any representations of fact. He was merely one member of a committee empowered to sell bonds at the best price obtainable.

In a private letter to Mr. Scott accompanying the above-quoted letter of April 27, he said (Rec., 258):

"At our meeting of the 22d inst. we increased the capital stock to $350,000. Estimating our business the same as last year, we can pay the interest on $300,000 of bonds and still continue dividends the same as we are now paying of one per cent. a quarter on the stock or four per cent. per annum."

In acknowledging the two letters of April 27, Elliott, Johnson & Co. say (Rec., 236):

"Our present plan is to offer the bonds in our circular at 95, with but 25 per cent. in stock. We do this so that we make large concession in price and give the additional stock to some big customers we hope to induce to purchase. They will be very much more apt to buy if they think special terms are made for them. We hope to be able to work off most of the bonds this way. Kindly forward us maps, as many as you can spare, up to one hundred. We propose to take off our coats and push this matter so soon as it is in complete shape. To offer it earlier would hurt it. We shall work with confidence as we believe in your company and yourselves."

It turned out to be unnecessary for Elliott, Johnson & Company to give away the surplus stock to induce big

purchasers to come in, so they kept it themselves as part of their profit in the transaction (Rec., 247). In fact, they agreed not to give anyone more than 25 per cent. of stock (Rec., 242).

Increase of Stock in 1889.

The resolution in regard to increase of stock, a copy of which was sent to Elliott, Johnson & Co., with Mr. Carlisle's letter of April 21, 1889 (Rec., 257), were as follows (Rec., 348, 349):

> "Whereas, there have been expended for permanent improvements and betterments, including machinery, barges, flats, etc., during the years 1884, 1885, 1886, 1887 and 1888, more than the sum of one hundred and sixty thousand dollars, all of which sum has been furnished from the net earnings of the company and fairly belongs to the stockholders of the company; therefore
>
> "*Resolved*, That the directors of this company be, and hereby are, authorized and requested to direct the president and secretary of the company to issue one thousand shares of the capital stock of the company, to be divided pro rata among the present stockholders of this company as follows:
>
> To B. D. Harris, 300 shares.
> To G. D. Harris, 300 shares.
> To John Carlisle, 220 shares.
> To G. W. Carlisle, 150 shares.
> To George S. Richardson, 26 shares.
> To James C. Holden, 2 shares.
> To Loring Hinsdale, 2 shares."

The resolution of the directors was of substantially the same tenor, and directed stock to be issued accordingly (Rec., 351).

In accordance with this resolution 300 shares of stock were issued to B. D. Harris, represented by certificates Nos. 41, 45 and 46 (Rec., 222, 223). All this stock was transferred out of the name of B. D. Harris prior to March 8, 1890 (Rec., 222, 223). Corresponding amounts

of stock were issued to all the other stockholders, *pro rata*, according to the terms of the resolution.

Elliott, Johnson & Co. knew that this stock, thus issued to the former stockholders, was the stock to be delivered to their customers. They were told so by Mr. Carlisle (Rec., 104, 138), and in their letters asking for stock they frequently asked that it should be "transferred" to the names which they furnished (Rec., 242, 243, 244, 245, 247, 248, 250, 252). When they pledged certain bonds as collateral for money borrowed by the company, they omitted the stock, recognizing that it was not property of the company (Rec., 251).

Sale of Stock and Bonds through a Common Agent.

In order to enable the stock to be delivered in connection with the bonds, for a gross price, Mr. Reuben Tyler, counsel to the company, prepared a form of agreement which was intended to avoid any legal objection to the company's dealing in its own stock. A copy of this was sent by Mr. Carlisle to Mr. Harris with his letter of April 27, 1889, in which he said (Rec., 274):

> "I also enclose a proposition of the stockholders which Mr. Tyler carefully prepared, so that we could legally take the $75,000. The company cannot legally buy its own stock and reissue it. If bought by the company it must be cancelled. If you approve, please sign and have your brother sign, and return to me, when we will sign it; then I shall have a meeting of the board here and accept the proposition."

The proposition referred to was signed by all the stockholders, except Holden and Hinsdale, and was laid before the Board of Directors at a meeting held May 13, 1889, at

which B. D. Harris was not present (Rec., 352). The proposition was as follows:

"PROPOSITION OF STOCKHOLDERS OF THE GREAT WESTERN MINING AND MANUFACTURING COMPANY TO THE DIRECTORS OF SAID COMPANY.

"WHEREAS, the directors of the Great Western Mining and Manufacturing Company have taken steps to borrow the sum of $300,000 to be used in payment of existing indebtedness of the company, and to provide additional working capital, &c., and have authorized the president and secretary to execute bonds for said amount, and negotiate the same at the best price obtainable.

AND WHEREAS, we are informed that it will probably be possible to find purchasers for said bonds at the price of eighty-five per cent. of the par value thereof, provided stock of the company, to the extent of fifty per cent. of the par value of the said bonds, shall also be transferred to the several purchasers of said bonds;

AND WHEREAS, it is deemed to *him* expedient to issue any new stock of the company for such purpose; and desiring to do all we can to assist the Directors in procuring said loan and the sale of said bonds;

WE THEREFORE make this proposition to the directors of the company in reference to the sale of stock held by us in said company, to the purchasers of the said bonds, to wit:

We will sell to the several purchasers of said bonds of the company, stock of the company belonging to us, in the amounts set opposite to our names respectively, and will furnish to the secretary of the company certificates of said stock, assigned in blank, to be by him delivered to said purchaser of said bonds, upon the understanding and agreement, that we are to receive the sum of $50 for each share of stock so sold by us, out of the money paid for said bonds, and said secretary shall act as our agent in receiving said amounts, and shall pay us the same, before the company shall be entitled to have the remainder of the money paid for said bonds by the purchasers thereof.

This action is not to be constructed as a proposition to sell said stock to the company, but it is to be treated and regarded as a sale of stock directly to the purchasers of said bonds, to be paid for by them to us, and the payment by them to the secretary of this company, for said

bonds, shall be regarded as a payment to us for said stock to the extent necessary to pay us therefor upon the terms above stated.

In testimony whereof, we have hereunto set our hands on this third day of May, 1889.

B. D. HARRIS.....	450 Shares.
G. D. HARRIS.....	450 Shares.
JOHN CARLISLE	336 Shares.
GEO. S. RICHARDSON.....	39 Shares.
G. W. CARLISLE.....	225 Shares.
Total.....1,500 Shares."	

The directors' minutes show (Rec., 353):

"After full consideration of the proposition, the same was accepted, and the secretary was authorized to act as the agent for said stockholders in the proposed sale of their stock and the collection of the purchase money therefor, and directed to turn over the net proceeds of the sale of bonds into the treasury of the company."

As required by their contract with the Company, the stockholders delivered to the Secretary, from time to time during the year 1889, certificates for full-paid shares to the amount of $150,000 (Rec., 131), and the Secretary transferred these shares on the books to the names of persons designated by Elliott, Johnson & Co., and forwarded the certificates to Elliott, Johnson & Co. for delivery (Rec., 105).

In remitting for the bonds and stock Elliott, Johnson & Co. used a standard form of correspondence substantially as follows (Rec., 245):

"In payment for $6,000 Gt. Western Mng. & Mfg. Co. 1st 6's with $3,000 stock of the same company at 85, we enclose our check No. 8,597 to your order for $5,100."

From the undisputed facts it is apparent that the money was paid for the bonds and stock; that it came into the possession of John Carlisle, as joint agent of the stockholders and the corporation, and was by him divided between

them according to their agreement. The real nature of the transaction is not obscured even by the ingeniously worded questions put to Mr. Carlisle by the complainant's counsel. His testimony at pages 130 and 131 of the Record is as follows:

"Q. Mr. Carlisle, after this $75,000 was paid and realized from the sale of these bonds, and received by the company, I understand it came into your possession as treasurer?

A. Yes, sir.

Q. How was the money distributed among the stockholders? Who paid it in proportion to the amount of stock which they had transferred?

A. I did.

Q. You paid it out of that money, did you, that you received from Elliott, Johnson & Co.?

A. I paid for the stock out of the money I received from Elliott, Johnson & Co.

Q. In what manner did you pay it? for example, how did you pay G. D. Harris?

A. Under the arrangement made with the stockholders each one furnished *pro rata* their proportion of stock, which was put in my hands, and whenever sold each was to receive the proceeds. As I received the money from Elliott, Johnson & Co. I would send checks to the different parties for their stock that was sold with the bonds.

Q. Did you pay them from time to time?

A. I paid them from time to time as I received it from time to time.

Q. Was all the stock in your possession?

A. All the stock was sent to me when I requested it, the total of 1,500 shares.

Q. Had the certificates ever gone out of your possession?

A. Oh, yes, long previous to that.

Q. Were they all sent back at one and the same time?

A. No, they were all sent back at different times.

Q. Was there correspondence between you and B. D. Harris showing that?

A. I think some of it shows where I acknowledged the receipt of stock, where I wrote him to send me stock. I think that shows in that.

But I would generally get the stock from B. D. Harris when I went East and save registering the letter, you know."

The sale of bonds and stock proceeded with reasonable success during the Summer of 1889. By July 3, 1889, more than two-thirds had been sold (Rec., 247, 248). In the Fall of 1889 the market for all kinds of investment securities was very weak (Rec., 254), and Elliott, Johnson & Co. gave an option on all the remaining bonds to a German banker (Rec., 284). The option was not exercised. A statement dated January 11, 1890, shows 43 bonds remaining unsold (Rec., 287). In March, 1890, B. D. Harris wrote to John Carlisle as follows (Rec., 283):

"I hope you will at once notify Elliott & Co. that the bond deal will positively be closed April 1st, and that all bonds remaining unsold at that date must be promptly returned to you.

They certainly ought to dispose of the remaining $90,000 (I understand that is the amount unmarketed) before April 1st, but, if they don't, my brother and I will take one-fourth, you another, and the working capital one-half at 85 and 50 per cent. stock and close the deal in this way. I am not willing that this shall hang along a single day beyond the time named."

The Controversy about Supporting the Market.

About this time general financial conditions became more unfavorable, and Elliott, Johnson & Co. began to press the Harrises and Carlisles upon an alleged agreement to "support the market" for bonds and stocks of the Great Western Mining and Manufacturing Co. This suggestion was energetically opposed by B. D. Harris, who wrote to John Carlisle, under date of March, 15, 1890, as follows (Rec., 238):

"In my opinion it would be absolute suicide for the company to enter into any such scheme involving obligations to buy back the securities we

have had so much trouble and expense to sell. To sustain the market effectually would surely bankrupt the company. You say they (Elliott & Co.) 'wish us to list the bonds as per agreement.' What agreement? At the time they claim it was made my brother and I, owning three-fifths of the stock, had no knowledge whatever of any such scheme, and of course, never agreed to it and have never since agreed to it. On the contrary, the only time it was ever mentioned to me in the presence of Elliott & Co. (Mr. Scott) I emphatically opposed it, finally saying that if it was done at all it should be by individuals and never by the company, and I did not agree to this even, but said I should consider it when the time came; it would be simply throwing away whatever was put up without a penny's benefit to anybody except the brokers. What do we care whether the bonds sell on the market or not? Our only concern should be to pay interest and dividends."

Elliott, Johnson & Co. still persisted in their claim that the Harrises and Carlisles should support the market, and it is evident that the discussion reached a certain degree of warmth. Under date of June 2, 1890, Mr. Harris wrote to John Carlisle (*Rec.*, 292):

"Herein find letter from Elliott, Johnson & Co. with copy of my reply. It is decidedly cheeky to say I offered to put up money to sustain bonds. I did nothing of the kind, being very careful while saying nothing to interfere with the sale of bonds, to make no positive promises and I did not make any. I know what I was about and unless they want to quarrel with me, Elliott & Co. had better not accuse me of saying one thing and doing another. That is not my style."

John Carlisle was willing to fall in with the suggestion about supporting the market (*Rec.*, 263), and if it had not been for the determined opposition of Mr. Harris, the funds of the company would probably have been used, as Elliott, Johnson & Co. insisted they should be used, in sustaining the price of its bonds upon a falling market. The memory of this episode may tend to explain the attitude of Elliott, Johnson & Co. toward Mr. Harris in the course of subsequent events.

Causes and Results of the Receivership.

One result of the sale of stock was that the Harrises lost control of the company, and a voting control rested with Elliott, Johnson & Co. in conjunction with John Carlisle. At the annual meeting in 1890, Mr. Holden retired as a director, and his place was taken by H. P. Scott, of Elliott, Johnson & Co. (Rec., 354).

The business of the company in 1890, 1891 and 1892 continued to be profitable (Rec., 140). The earnings in the first half of 1889 were about $19,000 (Rec., 295). For the last half they do not appear, but in 1891 they were about $33,000 (Rec., 148). Dividends were declared, but some of the larger stockholders left their dividends uncollected, as a loan to the company, because extensive betterments and improvements were being made, and the company needed the money (Rec., 149, 141).

The directors' minutes of this period indicate a considerable willingness to incur liabilities. April 24, 1889, the directors voted to acquire the stock and assets of the Elevated Railway & Coal Company of Cincinnati, at a cost of $12,000, and to improve the same at a cost of $3,000 (Rec., 354). April 23, 1891, the purchase of the capital stock of the Carlisle Coal Company was authorized at a cost of $30,000, and improvements, &c., to cost $20,000 (Rec., 357). July 15, 1891, a change in the system of mining at a cost of $5,000 was authorized (Rec., 358). At the stockholders' meeting held April 28, 1892, the directors were authorized and empowered to borrow $30,000 for the purpose of utilizing the waste at the mines for making brick (Rec., 359, 360). All the moneys appropriated by these resolutions may not have been used, but large

sums were certainly expended on miscellaneous extensions and improvements (Rec., 141, 149), thereby creating a large floating indebtedness.

At the directors' meeting held September 21, 1892, the minutes show (Rec., 362):

> "Mr. Carlisle reported that his failure had compelled an application to the U. S. Court for the appointment of a receiver of the company by reason of his name being endorsed on the company's notes for coal purchased, and the holders of said notes bringing suits and attachments against the company, the application was made in order to save the property and prevent its being sacrificed.
>
> The Court appointed Mr. L. C. Black, receiver, on September 13th."

The order continuing the receiver appears at page 362 of the record, by which it would appear that he was an ordinary chancery receiver, without any special statutory powers.

Among the liabilities of the company appeared a great many notes of the company, endorsed by John Carlisle (Rec., 373 to 377). One, at least, of these represented an indebtedness not incurred for the benefit of the Great Western Mining and Manufacturing Company (Claim of Cincinnati Volksblatt Co., Rec., 150). Mr. Carlisle denied that there were any others, and the evidence does not show what the fact was.

During the first six months of the receivership the earnings were at a rate which, if continued, would have been sufficient to pay the interest on the bonds (Rec., 184). Nevertheless, a reorganization committee was formed, of which Mr. Scott, of Elliott, Johnson & Co., was a member (Rec., 183, 327), and so promptly were the proceedings conducted that a Master's report of the amount due was filed October 16, 1893 (Rec., 380), and a foreclosure

sale had December 23, 1893 (Rec., 181, 377). An application was made to the Court in the Summer of 1893 to direct the receiver to pay the interest, but for some reason it was never pressed (Rec., 184). The counsel for the bondholders' committee were also counsel for the receiver (Rec., 183), and at the foot of one of the receiver's schedules appears the significant note (Rec., 385):

"I have not written E. J. & Co. on this subject."

The purchasers at the foreclosure sale were the bondholders' committee, who have continued to operate the property as an active mining enterprise under a corporate organization (Rec., 182).

The Proposed Suit against Mr. Harris.

The evidence differs as to the time when Mr. Black and Mr. Scott first talked over the project of bringing suit against Mr. Harris. Mr. Scott says that the matter of the division of the proceeds of sale of bonds and stock was first brought to his attention by Mr. Black when he was "attempting to reorganize the property" (Rec., 25). This must have been in 1893. Mr. Black thinks the conversation occurred "in connection with the closing up of the sale of the property" (Rec., 183). However that may be it was not until January 22, 1895 (Rec., 365, 366) that the receiver presented to the Court a petition stating in substance as follows:

"Your receiver says that he finds shares of capital stock of the Great Western Mining and Manufacturing Company were issued at the instance of and through the action of certain of said stockholders and officers of said company, to the amount of $150,000, which said stock was distributed among said stockholders and officers; that, as your receiver is informed and believes, there was no consideration for the issue and distribution of said stock; that the said stock was sold by said stockholders,

so as aforesaid receiving it, to the defendant The Great Western Mining and Manufacturing Company, and by means of said sale moneys to the amount of $75,000 were abstracted from the treasury of said company; that the issue and distribution of said capital stock was, as your receiver believes, a mere device or instrumentality to abstract said moneys from the treasury of said company; that said company, as your receiver believes, has a valid claim against said persons to recover said moneys; that some of said parties are solvent and able to repay said monies, and proceedings should be taken to recover it for said company and its creditors."

The receiver then goes on to make a general charge of negligence against the directors, and prays the direction of the Court as to his duty in the premises.

We are at a loss to understand why, in thus seeking the aid and direction of the Court, the receiver should have failed to disclose the facts constituting the real difficulty of the problem, viz.:

(*a*) That the increased stock was distributed *pro rata* among all the stockholders.

(*b*) That the relative interest in the corporation represented by such stock was not retained by the old stockholders or by the company, but was sold to new stockholders.

(*c*) That such sale was necessary in order to enable the corporation to float its bonds.

(*d*) That the moneys received by the old stockholders were limited to the agreed value, which was also the actual value, of the relative interest in the corporation which they turned over to the new stockholders, in connection with the purchase of bonds.

Evidently the receiver considered that the advice of the Court, given upon an incomplete statement of facts, would be at least as useful to him as if it were given with

full knowledge. Upon the receiver's meagre statement of the case the Court made an order as follows (Rec., 366):

> "This cause coming on to be heard upon the application of L. C. Black, receiver herein, asking for instructions as to his duty in the matters and things set forth in the said application, and wherein said receiver represents to the Court that in certain transactions connected with the floating of a loan of $300,000 upon the property of the Great Western Mining and Manufacturing Company, apparently $75,000 was withdrawn by certain stockholders and officers of the said company, whereas the same should have been paid into the treasury of the said company; and wherein said receiver further represents that apparently certain stock was issued to the stockholders and officers of the said company without consideration, and that apparently by reason of the inattention and negligence and mismanagement of the board of directors of the said company and the misappropriation of the funds of the said company, said company has been greatly damaged and its assets depreciated.
>
> And its appearing to the Court that it will be for the advantage of the said company that suit shall be instituted against the stockholders and directors of the same for the recovery of the sums so represented to be lost, it is therefore directed that said receiver proceed in his own name as receiver or in the name of the company, as he may be advised, to recover said sums."

Under color of authority of said order the receiver, on July 8, 1895, filed his bill of complaint herein against B. D. Harris as sole defendant (Rec., 1, 2). B. D. Harris appeared and answered, and thereafter the cause was allowed to languish until September, 1898, when the testimony of Henry Scott was taken at Wilmington, Del. (Rec., 18). B. D. Harris died shortly thereafter, on or about January 19, 1899 (Rec., 28), and a motion was made to revive the suit against the executors (Rec., 27), which was granted by the learned Circuit Court upon the ground that the cause of action, so far as it sought an accounting for personal profit made by the deceased director at the expense of the corporation, was one which

survived (Rec., 31, 32). Testimony having been taken, the cause was brought on for hearing before Judge WHEELER, in February, 1902. The complainant then claimed a declaration by the Court that the estate of B. D. Harris was liable (Rec., 193):

"(1) For the sum of $75,000 as a joint and several liability of the directors and officers of the company, with interest thereon from January 11, 1890, the first date shown by the record that the $75,000 had been taken from the company (Exhibit 98, letter, John Carlisle to B. D. Harris, dated January 11, 1890).

(2) For $45,000 as a several liability as stockholder, on account of the issue to himself, without consideration, on January 11, 1888, of one hundred and fifty shares or $15,000 of stock, and on April 22, 1889, three hundred shares or $30,000 of stock to be accounted for $15,000 as of January 11, 1888, and of $30,000 as of April 22, 1889.

(3) For the damages suffered by the company by reason of the issue to other stockholders of the Great Western Mining and Manufacturing Company by B. D. Harris and the other officers and directors of the company on January 18, 1888, of three hundred and fifty shares or $35,000 of stock, and on April 22, 1889, of seven hundred shares or $70,000 of stock without consideration, to determine which said damages and injury a reference should be had to a master.

(4) For the dividends wrongfully paid out of capital stock between April, 1889, and July, 1892, as a joint and several liability of the directors and officers of the company so paying said dividends, and for the dividends paid B. D. Harris individually as a several liability of his estate."

For reasons stated in his opinion (Rec., 185–191) the learned Judge gave judgment against the executors for $15,000, being the amount received by B. D. Harris upon the sale of stock of the increased issue of 1889 (Rec., 194).

Both parties appealed, and the learned Circuit Court of Appeals reversed the judgment of the Circuit Court and dismissed the bill (Rec., 386 to 400).

The cause was then removed to this Court by certiorari (Rec., 402).

The Pleadings.

The bill of complaint charges that on November 10, 1887, the Great Western Mining and Manufacturing Company had outstanding 2,000 shares of stock of the par value of $100 each; that 600 of these shares of stock were owned by B. D. Harris (Rec., 2); that on said day the corporation increased its capital stock and distributed 500 additional shares among its stockholders *pro rata*, B. D. Harris receiving 150 shares; that on April 22, 1889, it again increased its capital stock and distributed 1,000 shares *pro rata*, B. D. Harris receiving 300 shares (Rec., 3); that said issues of stock were made ostensibly to represent betterments paid for out of the net earnings of the company; that in fact there were no such betterments or earnings (Rec., 3); that the corporation was insolvent; that the stock was worthless and issued without consideration (Rec., 5, 4); that said issues of stock were made in pursuance of a plan for issuing mortgage bonds and selling the same with a bonus of stock (Rec., 3, 4); that afterwards $300,000 of bonds were sold with a bonus of stock amounting to 50 per cent. of their par value, at a price equal to 85 per cent. of the par value of the bonds (Rec., 5); that of the stock used as bonus, B. D. Harris furnished 450 shares, and that there was paid to him out of the proceeds of the transaction $22,500; that the transaction amounted to a sale to the company of its own stock at the rate of fifty cents on the dollar (Rec., 5); that all the other stockholders furnished stock and received payment out of the proceeds in like manner and at the same rate; that the directors negligently left the sole management of the business of the company in the hands of John Carlisle, its

treasurer, and permitted and directed said John Carlisle to pay certain dividends to sundry persons whose names were unknown to the complainant, when, in fact, the company had made no profits out of which such dividends could be paid; that the company suffered damage in other ways on account of the negligence of the directors in leaving the management of its affairs to John Carlisle (Rec., 6); that on or about September 12, 1892, in a suit brought by the assignee of John Carlisle, one L. C. Black was appointed receiver of the assets of the company for the purpose of realizing upon the same for the benefit of its creditors; that in said proceeding all the property of the complainant was appraised and sold and found to be of the value of $75,666.66, leaving a floating indebtedness outstanding of about $90,000, besides a balance of about $270,000 upon the bonded indebtedness of the company (Rec., 6); that the receiver did not discover the matters set forth in the bill until March, 1894, and that by an order of the Court appointing him he had been directed to bring this suit, either in his own name or in the name of the corporation, as he thought proper (Rec., 7). The bill also, at various stages, charges the existence of a conspiracy and fraudulent intent on the part of all the directors and stockholders, and characterizes their acts as "defrauding said company," "abstracting the assets of said company, "abstracting from the assets of said company money arising from the sale of said bonds" (Rec., 3, 4, 5), and, also, that "all the issues of stock after the first issue thereof were fictitious, fraudulent, illegal and void" (Rec., 7).

The answer denies the charges of conspiracy and fraud-

ulent intent (Rec., 10, 12), alleges that the money paid to B. D. Harris was his own money (Rec., 12), and that the same was received by John Carlisle as his agent, derived from the sale of his property (Rec., 12); that the stock issues were made in good faith and were believed by the stockholders and directors to be warranted by the value of the property and the betterments placed thereon (Rec., 10, 11); that such belief was justified by the report of an experienced mining engineer and geologist (Rec., 11); that all the transactions complained of had been approved and assented to at the time by all the stockholders and directors (Rec., 15); denies that any stock was sold to the company or that the company paid for the stock (Rec., 19); denies that the company was insolvent or that any dividends were paid, except from net earnings (Rec., 19); answers fully the charge that John Carlisle was negligently permitted to mismanage the affairs of the company (Rec., 13, 14); avers that the temporary embarrassment of the company in September, 1892, was due to the prevailing depression in business, the great shrinkage in values and the difficulty of procuring ready money by which many other enterprises in the country were affected to an even greater extent (Rec., 14); that the application to the Court for a Receiver was made at the instance of the principal stockholders for the purpose of protecting the company's interest; that the earnings of the company during the first three months of the receivership were $7,000, or nearly twice the amount needed to meet the interest on the bonds; that the receiver afterwards so mismanaged the company that great losses were sustained and the bond-

holders were enabled to combine and bid in the property at a nominal price (Rec., 14), and that the property was acquired by a syndicate, which reorganized it with a capitalization of $650,000 (Rec., 15).

Brief of the Argument.

We will present our argument in relation to this case under the following heads:

I.—The limitations inherent in the alleged cause of action render inapplicable many of the arguments advanced in support of the appeal.....(page 35)

(*a*) The bill was properly dismissed unless the facts alleged and proved established a right vested in the Corporation.

(*b*) The bill was properly dismissed unless the facts alleged and proved established a cause of action which survived against the personal representatives of the deceased director by the laws of Vermont.

(*c*) The bill was properly dismissed unless the facts alleged and proved established a cause of action within the equitable jurisdiction of the Circuit Court.

(*d*) The bill was properly dismissed unless the facts alleged and proved established a cause of action within the scope of the order authorizing the Receiver to sue in the corporate name.

II.—The concurrent judgment of the Courts below upon the questions of fact involved, should not be disturbed except for manifest error.....(page 43)

III.—The issue of an increased number of shares *pro rata* had the effect merely of enabling the stockholders to split up their respective interests into more convenient fractions. It did not deplete the assets of the corporation.....(page 45)

IV.—The share stock, regardless of the time of issue, was the property of the individual shareholders and not of the corporation.....(page 52)

V.—The fact that bonds and stock were sold through a common agent to the same purchasers did not injure the corporation, provided the proceeds were fairly divided.....(page 60)

VI.—There was a fair division of the proceeds of sale as between the bonds and stock.....(page 66)

VII.—The bill is not sustainable on the ground that Elliott, Johnson & Co., were deceived.....(page 68)

(*a*) No such issue has ever been tried.

(*b*) Elliott, Johnson & Co. had no interest in the matter beyond earning their commissions.

(*c*) There was no deception in fact.

(*d*) B. D. Harris never had any communication with Elliott, Johnson & Co., except of the most general nature.

VIII.—The bill is not sustainable on the ground that the purchasers of bonds and stock from Elliott, Johnson & Co. were deceived .....(page 75)

(*a*) No such issue has ever been tried.

(*b*) There is no evidence that any purchasers were deceived.

(*c*) It is extremely improbable that any deception occurred.

(*d*) Even if a promise was made to use the proceeds of sale in a particular way, that did not impress the proceeds with a trust.

(*e*) The judgment, if any, recovered by the complainant in this case would not enure to the benefit of the purchasers, if any, who were deceived.

(*f*) If any fraud was committed, defendants' testator had no part in it.

(*g*) If any fraud was committed, it was not injurious to the corporation.

IX.—The bill is not sustainable on the ground that B. D. Harris was a promoter and bound, as such, to account for profits.....(page 97)

X.—The bill is not sustainable upon the ground that it is brought for the avoidance of a transaction between the corporation and one of its directors or to compel a director to account for illicit profits.....(page 108)

XI.—The bill is not sustainable upon the ground that it was *ultra vires* of the corporation to deal in its own stock.....(page 115)

XII.—The claim for repayment of dividends is not supported by allegations or proof.....(page 124)

XIII.—The bill is not sustainable on the ground of liability on stock not full paid.....(page 125)

XIV.—The corporation and all its stockholders are estopped from questioning the transactions now complained of.....(page 126)

(*a*) Prior creditors were all paid.

(*b*) Subsequent creditors cannot and do not object.

(*c*) All stockholders at the time consented.

(*d*) The present stockholders are bound by the assent of their predecessors in title.

XV.—The order of the Circuit Court for the District of Kentucky was not effective to authorize the receiver to maintain a suit in the name of the Great Western Mining and Manufacturing Company in the Circuit Court for the District of Vermont.....(page 144)

I.

The limitations inherent in the alleged cause of action render inapplicable many of the arguments advanced in support of the appeal.

Under this heading we propose to call attention, briefly, to some of the obvious limitations applicable to the only cause of action upon which the complainant could possibly hope to obtain judgment—limitations not always regarded in the bill or in the subsequent arguments of the complainant's counsel—but which are nevertheless too elementary to require separate or extended discussion.

It was held by the learned Circuit Court of Appeals that the receiver had no right at all to file this bill in the District of Vermont, the receivership not having been extended to that District by appropriate proceedings. That question will be discussed under a separate Point (XV). For the purpose of getting at the merits of the case we will assume that the receiver had due authority and legal capacity to file the bill, and that the nature of his claim

is substantially as set forth in his petition to this Court for the writ of certiorari.

(a) *The bill was properly dismissed unless the facts alleged and proved established a right vested in the corporation.*

The proposition that the recovery in an action, if any, must be by virtue of some right vested in the person who is put forward in the bill of complaint as complainant, seems so manifest as to require little or no argument for its support.

This principle is illustrated by cases which have frequently arisen in the federal courts upon the question of diversity of citizenship, where a suit has been brought by an infant by next friend, the next friend being a citizen of same State as the defendant, but the infant being a citizen of a different State. In these cases the Court has held that the infant is the real party, and that his citizenship and not that of the next friend governs.

Williamson *vs.* Ritchey, 3 Dill.,406; Fed. Cas., 17734.

Woolridge *vs.* M'Kenna, 8 Fed. Rep., 650.

Voss *vs.* Neienber, 68 Fed. Rep., 947.

Dodd *vs.* Ghiselin, 27 Fed. Rep., 405.

The same rule applies in case of an action by a *feme covert* by next friend.

Ruckman *vs.* Palisade Land Co., 1 Fed. Rep., 367,

and in case of an action by a *non compos mentis* by next friend.

Wiggins (known as "Blind Tom") by next Friend, &c., *vs.* Bethune, 29 Fed. Rep., 51.

The converse of these propositions is the recognized rule that the plaintiff himself must have a right to sue and, if not, a suit by him for the use of those who could sue is not maintainable.

Buchter *vs.* Dew, 39 Ill., 40;
Larned *vs.* Carpenter, 65 Ill., 543.

In other words, if the cause of action in the present case does not exist in the corporation but in the receiver, or in some one else, then the suit is not maintainable. The receiver had his option to sue in his own name or in the name of the corporation, and he is bound by his choice. No matter what his powers may be as receiver, he cannot, in an action brought in the name of the corporation and in which the citizenship of the corporation is relied upon to sustain the jurisdiction, assert rights which do not belong to the corporation and which were never vested in the corporation.

(b) *The bill was properly dismissed unless the facts alleged and proved established a cause of action which survived against the personal representatives of the deceased director, by the laws of Vermont.*

The survival of causes of action arising under or subject to the operation of State laws is determined by those laws. In other cases it must be determined by the principles of the common law, as recognized and administered in the federal courts.

U. S. *vs.* De Goer, 38 Fed. Rep., 80.
Martin *vs.* B. & O. R.R. Co., 151 U. S., 673.

In a case where the cause of action arises in one State and suit is commenced in another the law of the State in

which the suit is brought and being proceeded with, and not of the State where the cause of action arose, governs.

B. & O. R.R. Co. *vs.* Joy, 173 U. S., 226.

The common-law rule is that a cause of action does not survive merely for an injury done, but only for the benefit derived by the defendant from such injury; and in such case only the cause of action for the value of the property shall survive against the executor.

United States *vs.* Daniel, 6 How., 11.

Witters, &c., *vs.* Foster, Adm., 26 Fed. Rep., 737.

Or, as the rule is aptly expressed by Lord Mansfield in *Hambly* vs. *Trott*, 1 Cowp., 376:

> "Where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. * * * So far as the tort goes an executor shall not be liable, and, therefore, it is that all public and all private crimes die with the offender, and the executor is not chargeable; but, so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor shall therefore be charged."

That actions for wrongs not involving personal profit to the wrongdoer do not survive in Vermont is well established by decisions of the courts of that State.

Barrett *vs.* Copeland, 20 Vt., 244.

Winhall *vs.* Sawyer, 45 Vt., 466.

The petitioner cites no statute of Vermont on the subject of the survival of causes of action, and it must, therefore, be assumed by this Court that in Vermont such survival is controlled by the principles of the common law. There is, in fact, a section of the Revised Laws of Ver-

mont on this subject, but, as stated in the opinion of Wheeler, *J.*, in *Witters* vs. *Foster*, 26 Fed. Rep., 737, this statute is not any more broad than the English statute of 4 Edw. III., c. 7.

(c) *The bill was properly dismissed unless the facts alleged and proved established a cause of action within the equitable jurisdiction of the Circuit Court.*

The learned Courts below did not err in refusing to grant relief upon matters not of equitable cognizance, notwithstanding the failure of the defendant to affirmatively plead the existence of an adequate remedy at law.

Allen *vs.* Pullman's, &c., Car Co., 139 U. S., 658.

Lewis *vs.* Cockes, 23 Wall., 466.

The bill in this case prayed, among other things, for a decree holding the defendants liable for loss caused to the Mining Company by the negligence and misconduct of their testator. Inasmuch as the petitioner still persists in this claim, notwithstanding it was rejected by the learned Courts below as not involving any matter of equity, the question arises, does loss caused a corporation by the directors' mis-feasance or non-feasance, furnish *per se* a case for equitable relief? In other words, is there an adequate remedy at law available to the corporation?

The answer seems to be that in respect to the powers with which they are invested directors are merely agents, while in respect to property of the corporation of which they may obtain title or actual posses-

sion they are to be regarded as trustees. For an abuse of power, therefore, the remedy is at law, while for an appropriation of assets to his own benefit the delinquent director may be pursued in equity.

Bay City Bridge Co. *vs.* Van Etten, 36 Mich., 210.

Marvin *vs.* Brooks, 94 N. Y., 71.

O'Brien *vs.* Fitzgerald, 143 N. Y., 377; 150 N. Y., 572.

Dykman *vs.* Keeny, 154 N. Y., 483.

Marsh *vs.* Kaye, 168 N. Y., 196.

American Sprits Mfg. Co. *vs.* Easton, 120 Fed. Rep., 440.

Boyd *vs.* Mutual Fire Ass'n (Wis., 1903), 116 Wis., 155, 178.

The case which seems to be relied upon by the petitioner is *Briggs* vs. *Spaulding*, 141 U. S., 132. That was a bill by a receiver of a National Bank against certain directors and executors of certain others, deceased, to charge them with liability for various acts of mis-feasance and non-feasance. The actual decision in that case was the dismissal of the bill on the hearing without costs as to those of the defendants who answered, and with costs at to those against whom the bill was taken as confessed. How any comfort can be afforded to the petitioner by this case is hard to say, inasmuch as counsel for neither party raised this question and neither the Court before whom the bill came on for hearing (30 Fed. Rep., 298) nor this Court upon appeal thereto, considered the question at all in their opinions. The point discussed by both courts was what constitutes ordinary

care on the part of a trustee, and this Court said on page 147:

> "Bank directors are often trustees, but not in any technical sense. The relation between the corporation and them is rather that of principal and agent. Certainly so far as creditors are concerned, between them and the corporation the relation is that of contract and not of trust."

In *National Bank of Commerce* vs. *Wade*, 84 Fed. Rep., 10; *Cockrill* vs. *Cooper*, 86 Fed. Rep., 7; and *Robinson* vs. *Hall*, 43 Fed. Rep., 222, bills in equity by receivers of National Banks against directors thereof for mis-feasance and non-feasance were entertained. But despite the *obiter* remarks of the learned District Judge in the case first cited, the fact remains that these cases have little bearing upon the general question, for the reason that the rights and liabilities of creditors, stockholders and directors of National Banks are based entirely upon a comprehensive and exhaustive statute, the purpose of which was to safeguard in every way, however unusual, the interests of the public; so that any case upon the liability of directors or stockholders of a national bank is simply a case of the interpretation of a particular and peculiar statute with a history entirely its own. The decisions under this statute really shed no more light on the question now under consideration than do the numerous decisions to be found in the State courts regarding the liability of the managers of savings banks.

(d) *The bill was properly dismissed unless the facts alleged and proved established a cause of action within scope of the order authorizing the receiver to sue in the the corporate name.*

Inasmuch as the receiver had no authority to use the

name of the corporation as complainant except that derived from the order of the Court which appointed him, and inasmuch as that order was limited to the enforcement of certain specified demands, it follows that any attempt to use the name of the corporation to enforce other demands was unauthorized, and the bill to that extent cannot be entertained.

Booth *vs.* Clark, 17 How., 322, 331.
Wynn *vs.* Lord Newborough, 3 Bro. C. C., 88.
Swing *vs.* White River Lumber Co., 91 Wis., 517, 522.
Reynolds *vs.* Pettyjohn, 79 Va., 327, 331.
Pouder *vs.* Catterson, 127 Ind., 434.
Merritt *vs.* Merritt & Lyon, 16 Wend., 405, 410.
Beach on Receivers, § 650.

The possible grounds of complaint are limited, therefore, to those specified in the order of the Circuit Court for the District of Kentucky (Rec., 367), viz.:

(1) Withdrawing part of the proceeds of a loan which should have been paid into the treasury of the company.

(2) Issuing stock without consideration.

(3) Inattention, negligence and mismanagement as a director.

(4) Misappropriation of the funds of said company.

II.

The concurrent judgment of the courts below upon the questions of fact involved, should not be disturbed except for manifest error.

Hy-Yu-Tse-Mil-Kin *vs.* Smith, 194 U. S., 401, 412.

Illinois *vs.* Illinois Central R. Co., 184 U.S., 77.

Upon the question whether moneys were improperly withdrawn by the defendants' testator in connection with the loan floated in 1889, which should have been paid into the treasury of the Great Western Mining and Manufacturing Company, the inquiries which arise at the outset are:

(1) Were the moneys remitted by Elliott, Johnson & Co. to John Carlisle proceeds of the sale both of bonds and of stock?

(2) Was the consideration fairly divided as between the bonds and the stock according to relative values?

(3) Had defendants' testator a right to receive that part of the consideration which constituted the proceeds of stock furnished by him for delivery to the purchasers?

The last question is a question of law and upon it the learned courts below differed, in respect to the proceeds of some of the shares of stock.

The first two questions are questions of fact and both the lower courts agreed in answering them in the affirmative.

The learned Judge who delivered the opinion of the Circuit Court said (Rec., 190):

> "Neither statement in the vote of this stock that it was based upon the expenditure of net earnings for permanent improvments, nor the provision in the proposal of the stockholders that the secretary should act as their agent in transferring the stock and receiving the money, nor the protest that the action should not be constructed as a sale of the stock to the company, but should be regarded as a sale to the purchasers of the bonds, could alter the nature of the transaction or its source or its place as a part of the consideration for the money received from the bondholders."

This is a distinct finding that the stock constituted a material part of the consideration for the money received, and it is approved by the Circuit Court of Appeals (Rec., 393). At page 397 that Court says:

> "The evidence shows that the bonds could not be floated without a stock bonus."

Again the learned Judge who delivered the opinion of the Circuit Court said (p. 190):

> "The bonds would not float at 60; the bonds and stock would at 85; the inference follows that the bonds brought 60 and the stock 25."

This is a distinct finding that the division of proceeds was fairly made, according to relative values. This also is approved by the Circuit Court of Appeals (Rec., 398).

If these findings are to be undisturbed, the only question that remains is whether defendants' testator was justified in retaining the proceeds of sale of his own private property, sold by him at the request of the corporation, for the purpose of facilitating it in the exercise of one of its corporate powers, viz., that of borrowing money.

III.

The issue of an increased number of shares *pro rata* had the effect merely of enabling the stockholders to split up their respective interests into more convenient fractions. It did not deplete the assets of the corporation.

The petitioner, at various stages of this case, but always in the same tone of righteous indignation, has denounced various features of the conduct of defendants' testator and his associates as fraudulent and wrongful. It is hard to tell where to begin a defense. In the petition for leave to begin this suit, the principal emphasis was laid upon the alleged issue of stock without consideration (Rec., 365). This is also the ground upon which the learned Circuit Court based its judgment (Rec., 190). We will therefore begin with that element of the alleged cause of action.

The stock increase of 1889 was upon the theory that net earnings to the amount of over $160,000 had been expended in five years for permanent improvements and betterments (Rec., 351). The record shows that about $130,000 had been expended, but not out of net earnings, a part of the money having been advanced by John Carlisle and part provided by an issue of bonds (Rec., 212), and only about $53,000 having been derived from earnings after deducting dividends and interest paid (Rec., 295). There is no proof that B. D. Harris *knew* what amount of net earnings had gone into permanent improvements. On the contrary, the record shows that he relied altogether upon

the statements of John Carlisle as to the condition of the company.

There being no constitutional or statutory prohibition against it, it was entirely proper to issue stock to represent net earnings left with the company for permanent investment as part of the capital.

Bailey *vs.* Railroad Co., 22 Wall., 604, 635.
Williams *vs.* Western Union Telegraph Co., 93 N. Y., 162, 189.

To some extent, at least, the issue of stock in 1889 represented net earnings which had been converted into capital, although not to the full extent of the stock issued. It cannot be said, therefore, that it was altogether without consideration.

Assuming, however, for the sake of argument, that the stock was issued wholly without consideration, who was harmed thereby? Certainly not the corporation. As between the corporation and its shareholders it was a matter of complete indifference by how many shares the interests of the latter were represented. If none of the stock had ever been transferred, the increase would have been wholly without practical effect. The relative rights of the shareholders would not have been altered, either in respect to voting power, or in respect to dividends, or in respect to the final distribution of assets on liquidation. The relation of the aggregate body of stockholders to the corporation, and the corporation's rights and obligations in respect to them would be wholly unchanged.

It is said, however, that the transaction has another color when the stock is issued for the purpose of transferring it. Why so? Has the corporation an interest in the

transfer of its shares? Does it concern the corporation in any way if A admits B to a part of his relative interest in the corporation? A purchaser of shares who buys with full knowledge of all the circumstances is certainly not injured. And even if a purchaser is deceived into buying that which he does not mean to buy, he has his own grievance and his own remedy, and the corporation is not his guardian.

In the case at bar the evidence does not indicate that the stock was increased with any definite intention of disposing of it to the customers of Elliott, Johnson & Co. or to any one else. The stock increase of 1888 was entirely disconnected from any project for the sale of bonds or stock, and the learned courts below have so found (Rec., 189, 392). The stock increase of 1889 was initiated by resolution of the Board of Directors on January 15, 1889 (Rec., 347), before any proposition for the sale of stock in connection with bonds had been made by any one, and before Elliott, Johnson & Co. had ever been heard of in connection with this company. It is true that the final steps were taken at the stockholders' meeting on April 22, 1889, after an extensive correspondence had taken place with the firm last mentioned. The notices of this meeting, however, were sent out on March 26, 1889 (Rec., 348), while Elliott, Johnson & Co. were still considering a proposition for the sale of bonds alone, unaccompanied by stock, as indicated by their letter of April 5, 1889 (Rec., 236).

There is nothing in the record on which to found a belief that the stockholders would have taken any different action from that which they did take, at the meeting of April 22, 1889, even though Elliott, Johnson & Co. had

never been heard of and the necessity for selling bonds had not existed.

But even if we take the view that the stock issue of 1889 was made simply and solely for the purpose of sale to the customers of Elliott, Johnson & Co., that does not support the proposition that the assets of the Great Western Mining and Manufacturing Company were thereby depleted. The situation seems to have been this: The purchasers were not willing to buy either bonds or stock separately. They were willing to give $255,000 for $300,000 of bonds, accompanied by a transfer of three-sevenths of the stockholders' equity. There is not the faintest suggestion in the record that they were deceived in respect to the aggregate number of shares outstanding or in respect to the relative interest in the corporation represented by each share.

That three-sevenths might have been represented by $107,143 of stock out of an issue of $250,000, just as well as by $150,000 of stock out of an issue of $350,000. The substance of the transaction would have been the same. Then each bond would have been accompanied by 35.714 per cent. in stock instead of by 50 per cent. in stock. Such a method of dealing would have been mathematically correct, but practically inconvenient and contrary to financial customs. In substance it would have led to the same result as what was done in this case, but it would have left no room for the argument by which alone the learned Circuit Court was able to convince itself that the money in question was the property of the corporation, and not of the individual stockholder, whose relative interest in the assets was diminished in order to produce the money.

To use another illustration, suppose at the same time when the corporation increased the number of shares from 2,500 to 3,500, it had reduced the par value from $100 to $71.43 per share, leaving the aggregate nominal capital the same as before. No one could claim that the corporation was deprived of anything by such a transaction. Yet that would have enabled the shareholders to have placed a fund of 1,500 shares in the hands of the Secretary for distribution with the bonds, and each purchaser of a $1,000 bond would have received five shares of stock, and those five shares would have represented the same voting rights and the same relative interests in the assets of the corporation that were actually transferred by the proceedings shown in this record.

These illustrations show the fallacy of the distinction drawn by the learned Judge who delivered the opinion of the Circuit Court between the proceeds of stock of the issue of 1888 and the proceeds of stock of the issue of 1889. The latter, he says, was issued as part of the transaction involving the sale of the bonds (Rec., 190). Since the stock was issued to the stockholders without consideration and immediately turned over to the purchasers of the bonds as part of the same transaction, the legal effect is the same, it is said, as though the stock had been issued directly by the corporation to the purchasers. The whole consideration moved from the corporation and it was entitled to the entire proceeds. The receipt by B. D. Harris of $15,000 out of the proceeds of sale of the last issue of stock, therefore, in the opinion of the learned Circuit Court, wrought a depletion of the corporation's assets.

We respectfully submit that this argument involves a

misconception of the effect of the last issue of $100,000 of stock. Before that issue of stock the stockholders owned the entire equity in the assets of the corporation. Subject to the payment of its debts, they were entitled to all the benefit that could be derived from those assets. *After the issue they owned the same thing.* They gained nothing and the corporation parted with nothing by the issue of additional stock. It merely placed in the hands of the stockholders an instrument whereby they could conveniently detract from the value of the shares of stock which they formerly held, in order to vest new and equal rights in the persons to whom they might transfer the new shares. Whatever of value passed to the purchasers of those shares was withdrawn, not from the assets of the company, but from the antecedent equity or interest which was vested in the stockholders making the sale. Taking the stock transaction by itself, it did not affect the company in any way. It merely diminished the relative interest in the corporation of those stockholders who engaged in it. From them, therefore, and not from the corporation, the consideration moved which was effective in producing the money here in question. It was a consideration drawn out of capital stock, it is true, but not from the stock of the company.

To such a situation the words of Judge WALLACE in *Foster* vs. *Seymour*, 23 Fed. Rep., 66, are applicable:

> "The corporation lost nothing by the transaction disclosed by the bill except the paper which was created and called capital stock. None of its capital was diverted."

This Court is not asked by either party to base its judgment on the *form* of the transaction. It is practically conceded that the form was free from objection.

The petitioner undertakes to ask a judgment resting upon the inherent nature of the transaction as involving a depletion of the assets of the corporation. It clearly appears that such was not the nature of the transaction, but that if anything was depleted it was the value of the shares retained by the stockholder and which he held in his own individual right.

Regarded as a suit to recover the value of stock issued without consideration, the decision of this Court in *Scoville* vs. *Thayer*, 105 U. S., 143, affords a complete answer to the bill. In that case this Court said (p. 153):

> "The stock held by the defendant was evidenced by certificates of full-paid shares. It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders and the fact was known to all. As between them and the company this was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy, and as between the company and the stockholders was just as binding as if it had been expressly authorized by the charter."

And in *Dickerman* vs. *Northern Trust Co.*, 176 U. S., 181, this Court said (pp. 202–3):

> "The very authorities which hold that the declaration that the stock is fully paid and non-assessable is not binding upon creditors also hold that the corporation cannot repudiate it, and proceed to collect either from the person receiving the stock or his transferee the unpaid part of the par value. * * * There is no doubt that if this were a suit by creditors to enforce payment of the unpaid portion of the stock subscription, the fact that the stock certificates declared that they were fully paid and non-assessable would be no defence; but it is a suit of stockholders in the right of the corporation, and as between the corporation and its stockholders the declaration that the shares are fully paid up and unassessable is a valid one."

IV.

The share stock, regardless of the time of issue, was the property of the individual shareholders and not of the corporation.

Underlying many of the arguments of the petitioner is the assumption that the shares of stock issued by a corporation are the property of the shareholders only in a qualified sense; that while they represent for the time being a certain relative interest in the assets of the corporation, yet such interest is subject to be diminished or otherwise dealt with through corporate action, in such manner as the officers and directors of the corporation may deem to be for its advantage.

This misconception explains the erroneous application of *Handley* vs. *Stutz*, 139 U. S., 417. Upon the authority of that case it is contended in substance that the Great Western Mining and Manufacturing Company had the power, without the consent of B. D. Harris, to take from him a part of his relative interest in the corporation represented by his shares of stock, and to sell it and apply the proceeds to its corporate purposes. In other words, it is argued that the corporation had the right to issue new stock to the purchasers of bonds; to receive for the bonds, accompanied by such stock, a larger price than could be obtained for the bonds alone, and to retain the entire proceeds to its own use.

It is further argued that because the corporation had this power, though it did not exercise it, therefore the estate of B. D. Harris should now be placed in the same position as though such power had been exercised.

Handley vs. *Stutz* will bear no such interpretation. It

is a case dealing with the liability of a creditor who received stock as a bonus upon the sale of bonds. The power of the corporation to issue such bonus stock, against the protest of any stockholder, was not considered, nor has it ever been determined by this Court that such power exists. In *Handley* vs. *Stutz* the transaction discussed was authorized by unanimous action of the stockholders, who voluntarily agreed to give up a part of their relative interest in the corporation in order to induce a purchase of bonds (139 U. S., 420).

The "bonus" referred to by this Court in *Dickerman* vs. *Northern Trust Co.*, 176 U. S., 202, did not come out of the treasury of the company but was provided by an individual out of stock which had been issued to him in payment for property.

In *Donald* vs. *American Smelting and Refining Co.*, 62 N. J. Eq., 729, it was held that a corporation of New Jersey, being a going concern, free from financial difficulties, could not, against the protest of a single stockholder, issue its stock at market value, when that was below par value, even though such a sale would be advantageous to the corporation. Still less could such a corporation issue stock as a "bonus" against the protest of any stockholder. Although the Court in deciding this case cited and relied upon the statutes of New Jersey, we see nothing in those statutes bearing on this question which differs from the general principles of law applicable to corporations.

The power to diminish the relative interest of each stockholder by the sale of new stock at par may or may not exist under the charter, and when it does exist of course

all the shares are subject to it. There are many decisions holding that a corporation, in disposing of an increased issue of stock, must give to each stockholder an opportunity to preserve his relative interest.

State *vs.* Smith, 48 Vt., 266.
Jones *vs.* Morrison, 31 Minn., 140.
Gray *vs.* Portland Bank, 3 Mass., 364.
Electric Co. *vs.* Edison Co., 200 Pa. St., 516.
Cook on Corporations, § 286, and cases cited.

But even though we should concede that a corporation may, indirectly, through the issue of "bonus" stock deprive its stockholders of a part of their relative interest in the corporation, it does not follow that it is bound to do so, or that the stockholders are bound to take the steps necessary to facilitate a deprivation of their property.

Nor does it follow that when a stockholder sells a part of his interest in the corporation, the latter can come down on him and claim the proceeds of the part sold because, by some procedure which it *might* have pursued but did not, the stockholder's interest could have been diminished to the same extent without yielding him any direct return.

Prima facie, at least, the stockholders' relative interest in the corporate assets is his individual property. So long, at least, as the corporation takes no action toward reducing such interest, his right of disposition is perfect and complete. If he sells it, or any part of it, he has an exclusive right to the proceeds. The possibility that his interest might have been relatively diminished before it was sold, does not place any cloud upon his title to the proceeds after a sale. As against any attempt by the corporation to diminish his interest, if he is not protected by the laws

of the land, at least he is protected to some extent by his own voting power.

Among the decisions which emphasize and illustrate the distinction between a stockholder's property in his shares of stock, and the corporation's property in its capital stock, we would cite:

Farrington *vs.* Tennessee, 95 U. S., 679, 686.

Foster *vs.* Seymour, 23 Fed. Rep., 65.

Taylor *vs.* South, &c., R. Co., 13 Fed. Rep., 152.

Hamor *vs.* Taylor-Rice Engineering Co., 84 Fed. Rep., 392.

Graydon *vs.* Graydon, 28 N. J. Eq., 229.

Christensen *vs.* Eno, 106 N. Y., 97.

Burrall *vs.* Bushwick Railroad Company, 75 N. Y., 211.

People *vs.* Coleman, 126 N. Y., 433.

In *Farrington* vs. *Tennessee*, 95 U. S., 679, Mr. Justice SWAYNE pointed out this distinction (pp. 686, 687):

> "The capital stock and the shares of the capital stock are distinct things. The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the bank, and the means of conducting its operations. * * * The shares of the capital stock are usually represented by certificates. Every holder is a *cestui qui trust* to the extent of his ownership. The shares are held and may be bought and sold and taxed like other property. * * * The capital stock and the shares may both be taxed and it is not double taxation."

The distinction between capital stock and shares as objects of taxation has been the subject of many decisions to the same effect.

City of Memphis *vs.* Ensley, 65 Tenn., 553.

State Bank *vs.* Richmond, 79 Va., 113.

State *vs.* Traveler's Ins. Co., 73 Conn., 275.

Savings Bank *vs.* Burlington, 118 Ia., 84.
Illinois Nat. Bank *vs.* Kinsella, 201 Ill., 45.
People *vs.* Coleman, 126 N. Y., 433.
Western Union Telegraph Co. *vs.* Poe, 61 Fed. Rep., 449.

In *People* vs. *Coleman*, 126 N. Y., 433, Judge FINCH said (p. 437):

"The capital stock of a company is one thing; that of the shareholders is another and a different thing. That of the company is simply its capital, existing in money or property, or both; while that of the shareholders is representative, not merely of that existing and tangible capital, but also of surplus, of dividend-earning power, of franchise and the good will of an established and prosperous business. The capital stock of the company is owned and held by the company in its corporate character; the capital stock of the shareholders they own and hold in different proportions as individuals. The one belongs to the corporation; the other to the corporators."

In *Foster* vs. *Seymour*, 23 Fed. Rep., 65, Judge WALLACE said, in regard to a state of facts somewhat similar to those herein complained of (p. 66):

"The corporation lost nothing by the transaction disclosed by the bill, except the paper which was created and called capital stock. None of its capital was diverted. This scrip was not capital stock. The capital stock of a corporation is the money or property which is put into a corporate fund by those who subscribe for stock and thereby agree to become members of the corporate body."

In *Hamor* vs. *Rice-Taylor Engineering Company*, 84 Fed. Rep., 392, Judge BRADFORD, in discussing the right of a corporation to purchase its own shares, said (p. 396):

"In its substantial sense, the capital stock of a corporation is the fund of money or other property actually or potentially in its possession, derived or to be derived from the sale by it of shares of its stock or their exchange by it for property other than money. * * * The capital stock of a corporation widely differs in legal import from the aggre-

gate shares into which it is divided by the charter. While the former includes only the fund above described, the latter represent the totality of the corporate assets and property, and, directly or indirectly, the management of the affairs of the corporation. The stockholders have the right, according to their amount of stock, to participate in dividends declared, to vote at stockholders' meetings, and on the dissolution of the corporation, after all corporate indebtedness has been paid, to share between them the remaining assets. A corporation may own property far in excess of its capital stock, or it may, with property less than its prescribed capital, be engaged in a very prosperous business, and in either case the value of the shares may, in the aggregate, be a multiple of the capital stock. So, when the corporate assets are in excess of the capital stock, the shares, through unreasonable delay in declaring dividends or other mismanagement, may be less than par in value. The value of the shares in the hands of the stockholders, therefore, is no criterion of the value of the capital stock."

In *Taylor* vs. *South & North Alabama R. Co.*, 13 Fed. Rep., 152, upon a question of the application of the statute of limitations, it was held by Judge BRUCE (p. 161):

"It is a general principle that the property of a corporation is a trust fund for the benefit of the stockholders, in the hands of the corporate body, which is the trustee; but capital stock in the corporation, the certificate or evidence of which is in the hands of its owner, who has paid for it, is neither a trust fund, nor is its owner a trustee; and it is not perceived why statutes of repose do not run to protect the owner in his right to such property, the same as it would in reference to any other class of property."

In *Graydon's Executors* vs. *Graydon*, 23 N. J. Eq., 229, upon a question of construction of a will, Chancellor ZABRISKIE said (p. 233):

"Shares in the capital stock of corporations are neither money nor securities. They are simply the title of a shareholder to his proportion of the corporate property and its income."

In *Christensen* vs. *Eno*, 106 N. Y., 97, the question was whether the defendant should be held liable on stock

issued as a gratuity to certain stockholders who had been compelled to pay calls on their original subscriptions in excess of what was represented would be necessary at the commencement of the enterprise. The plaintiff sought to hold Eno liable, not on the ground of contract, but no the charge of depleting the capital of the corporation. Judge ANDREWS, delivering the opinion of the Court, said (pp. 100, 101):

> "The capital of a corporation consists of its funds, securities, credits and property, of whatever kind which it possesses. The word 'capital,' applied to corporations, is often used interchangeably with the words 'capital stock,' and both are frequently used to express the same thing—the property and assets of the corporation. * * * The unissued shares of a corporation are not assets. When issued they represent a proportionate interest in the shareholder in the corporate property—an interest, however, subordinate to the claims of creditors."

In *Burrall* vs. *Bushwick Railroad Company*, 75 N. Y., 211, in determining the sufficiency of a complaint upon demurrer, Judge FOLGER said (p. 216):

> "The phraseology of the complaint has been used in this particular, with an inexact notion of what is the capital stock of a business corporation, and what are the shares of that stock; though it would seem to be a matter that at this day should be well understood. A corporation cannot issue and deliver a share of its capital stock. By the joint action of the corporation and the subscriber for its stock, he may become the owner of a given number of shares thereof, but not in such sense as that he may take away those shares out of the common corporate fund. The capital stock is that money or property which is put into a single corporate fund by those who by subscription therefor become members of the corporate body. That fund becomes the property of the aggregate body only. A share of the capital stock is the right to partake, according to the amount put into the fund, of the surplus profits of the corporation; and ultimately, on the dissolution of it, of so much of the fund thus created as remains unimpaired, and is not liable for debts of the corporation. * * * Those shares are intangible and rest in abstract legal contemplation. It has been said that they are not a species of property

that can be transferred by delivery; and that the assent of the owner to part with it must be expressed in writing."

It was in accordance with the spirit of these decisions that the Great Western Mining and Manufacturing Company, in the whole course of this transaction, recognized the principle that the interest or property which its shareholders had in the corporate assets, however represented, was not in itself an asset of the corporation. There was a particular reason why that principle should be recognized by this corporation, since twice before, through disregard of it, trouble had arisen.

(*a*) In 1863, there being a proposition pending for the purchase of all the stock of the corporation, the board of directors undertook to deal with it as a corporate matter, and to lay down rules as to the security to be required from the purchaser (Rec., 302). The board was compelled to recede from this position and to recognize the right of each stockholder to dispose of his stock as he saw fit.

(*b*) In 1883 an attempt was made to induce the stockholders to surrender, ratably, one half their stock,so that the relinquished stock might be sold to provide working capital (Rec., 330). The stockholders not consenting, the project failed.

In the light of these precedents it was a settled principle, so far so the Great Western Mining and Manufacturing Company was concerned, that the shares of stock were the exclusive property of the shareholders.

If the contrary view be taken, to the extent necessary to support this bill, it must be held that the corporation's right to appropriate the proceeds of a sale of stock is

(1) A right capable of exercise against each stock-

holder, irrespective of the treatment accorded to other stockholders.

(2) A right independent of the amount of stock sold, extending to a sale of the whole as well as of a fraction.

(3) A right inhering in the company and not in its creditors, capable of exercise in times of prosperity as well as of adversity.

In other words, the principle relied on by the petitioner, if it be valid at all, must go to the point of holding that if B. D. Harris, in 1889, had seen fit to sell his entire interest in this mining company, it would have been the right of the company (then a solvent, going concern in the full tide of prosperity) to have taken from him the entire proceeds of the sale; while leaving G. D. Harris, for example, in undisturbed possession of his shares, with full power to dispose of them and apply the proceeds to his own use.

V.

The fact that bonds and stock were sold through a common agent to the same purchasers, did not injure the corporation, provided the proceeds were fairly divided.

The petitioner seems inclined to qualify the broad claim presented in the bill, somewhat as follows:

> "The shareholder may have a right to his shares, and also to their proceeds, if he sells them in a legal and proper way; but if he sells them illegally or improperly, the proceeds do not belong to him, but to the corporation which issued the certificates."

We are not quoting his words, but stating what we understand to be one phase of his contention.

Inasmuch as there are several specifications of improper conduct in regard to the sale of the shares, we will take up first the objection that it was improper to sell them through the same agent that was selected by the corporation for the sale of its bonds.

The certificates for shares of stock authorized by vote of the stockholders in 1889 were not actually issued and delivered until after a new stock book had been obtained (Rec., 276). The right to receive such certificates, however, accrued immediately upon passage of the necessary resolutions by the stockholders and directors, and the stock must be deemed in existence from that time for every corporate purpose.

Tustone *vs.* Frankfort Bridge Co., 2 Bibb, 576.

Drury *vs.* McCracken, 14 Ky. Law Rep., 208.

Chester Glass Co. *vs.* Dewey, 16 Mass., 94.

There was, at that time, no definite plan for furnishing stock to sell in connection with the bonds. The manner in which that came to be provided for is described by John Carlisle as follows (Rec., 104):

"The way that the stock was obtained for that purpose was by getting the consent of all the stockholders to sell to the bondholders so much stock *pro rata* according to their holdings at fifty cents on the dollar. At that time the Mr. Harrises were holding the majority of the stock and I requested them to furnish it all, because I felt the stock was worth a good deal more than that and I did not care about letting mine go. They declined to furnish it all; they would only furnish their proportion of it, and all the stockholders agreed to do the same; an agreement of that kind in writing was made and given to the company."

At page 116 he testified:

"Q. How did you arrive at the valuation of 50 cents a share of the stock contributed?

A. That is what we agreed to take for our stock; we considered that we were giving away 50 per cent. more.

Q. How did you arrive at the amount, 50 cents on the dollar, do you remember?

A. It was just simply an agreement, we would sell at 50 cents on the dollar for that purpose, thereby giving up one-half of the value of the stock."

The transaction may very likely have shaped itself in their minds at that time as a sale of stock to the company, to be used by it to induce a purchase of bonds. Whether such a sale would be lawful or not is a question which will be separately discussed hereafter. It makes very little difference, for the transaction did not take that form.

On April 27, John Carlisle wrote to B. D. Harris (Rec., 274):

"I also enclose a proposition of the stockholders, which Mr. Tyler carefully prepared so that we could legally take the $75,000. The company cannot legally buy its own stock and reissue it. If bought by the company it must be cancelled.

If you approve, please sign and have your brother sign, and return to me, when we will sign it, then I shall have a meeting of the board here and accept the proposition."

The proposition referred to is the one already quoted at length (*supra*, p. 18), whereby John Carlisle was constituted an agent of the company for the sale of bonds and an agent of the stockholders for the sale of stock, and provision was made for dividing the gross returns between the bonds and the stock in such a way as to make payment for the stock at 50 cents on the dollar.

This proposition, while in form made by the stockholders to the company, was in fact prepared by the attorney for the company and laid before the stockholders by the agent

whom the company had appointed to find a market for its bonds.

The foregoing arguments have made it clear, we trust, that Mr. Harris was under no legal or moral obligation to accept this proposition. He might have kept his shares and his interest in the company would have remained just what it had always been. He might have sold his shares to an outsider and, unless some very novel view as to the relation between a corporation and its stockholders is to obtain, he would have had a right to the proceeds. Why, then, was he not free to accept this proposition if he deemed it beneficial to the corporation? It was placed before him by his associates who had studied the situation, as being the best course to pursue to enable the corporation to float its bonds. It appears to us that he was free to accept or to reject it.

That his acceptance of the proposition was not inspired by any doubt as to the future of the company or the value of its shares is evident, not only from his refusal to part with more than his proportionate amount of the stock(Rec.,104), but also from his letter of April 27, 1889 (Rec.,274),written just before this proposition was received. In it he says:

> "Elliott, too, I notice, asks for the value of the coal lands we own. It seems to me a proper standard, or comparison, can be found in the Youghiogheny coal district, where land having coal deposits similar in quality to ours, and certainly of no better quality, sells readily for $150 to $500 per acre, according to location, either near or remote from railroad transportation, and we certainly have the advantage over Pennsylvania mines in cheapness of mining and in nearness and certainty of market; in other words, we can make money (where we have perfected facilities for handling our coal) at prices that would run the Youghiogheny mines in debt, and we can reach Cincinnati and down-river markets in low water and during coal famine and high prices when they can not."

The question of the *motive* for selling the stock is wholly immaterial. If the stock was his in such a sense that he was entitled to the proceeds if he sold for a good motive, why was he not also entitled to the proceeds if he sold it with a bad motive or by an irregular method?

The *gist of the im*propriety charged by the petitioner in this transaction appears to lie in the fact that the stock and bonds were sold through a common agent and to the same purchasers. If sold through a common agent to different purchasers, the alleged impropriety would not exist. Or, if sold to the same purchasers, but through different agents, the objection would be removed. This criticism on the mode of sale appears to us to be purely fanciful. Even if there were any impropriety in such a method of sale, it does not appear that the interests of the corporation were sacrificed.

The evidence in this case indicates that the bonds and stocks of this mining corporation, when offered for sale together, found a better market than if they were offered separately (Rec.,20). Why should the corporation and its stockholders, if willing to sell both bonds and stock, be bound to incur the loss which would result from offering them for sale separately, contrary to the requirements of the market? Such a course would merely give an opportunity to some middleman to pick them both up at a diminished price and, by combining his purchases, to reap a profit. What principle of law or of morality forbade these parties to appropriate the middleman's profit to themselves, by offering their property for sale in the first instance according to the method which the demands of the market rendered most advantageous?

If the bonds and stock were separately owned by strangers who merely happened to learn, through a broker, of the advantage of pooling their biddings, their right to adopt such a method of selling their property would be unquestioned. If such a contract may be made between strangers, why may it not fairly be made between a corporation and its shareholders? There is no such relation between a stockholder and his corporation as forbids their co-operating freely in any transaction which they may deem advantageous for their several interests.

Stratton *vs.* Allen, 16 N. J. Eq., 229.
Wausan Boom Co. *vs.* Plumer, 35 Wis., 274.
Memphis, &c., R. Co. *vs.* Dow, 19 Fed., 388.

In *Farmers' L. & T. Co.* vs. *Chicago, &c., R. Co.*, 163 U. S., 31, this Court said (p. 44):

> "We do not understand that a stockholder is under obligations, legal or moral, to sacrifice his personal interests in order to secure the welfare of the corporation of which he is a stockholder, or to enable another stockholder to make gains and profits."

A fortiori, it follows that a stockholder is not bound to sacrifice his personal interests in order to embarrass the corporation by rendering the exercise of its corporate powers more difficult and circuitous.

VI.

There was a fair division of the proceeds of sale as between the bonds and stock.

No attempt was made to show by evidence that the division of the proceeds of sale was not fair, according to actual values at the time. There was proof of unsuccessful efforts to float the bonds, separately, so as to net the company 60 or 65 (Rec., 117, 118). There was also proof that the earnings of the company were sufficient to pay 4 per cent. dividends on the stock (Rec., 20). The Circuit Court found affirmatively that the division was in accordance with actual values (Rec., 190).

At first sight it would seem improbable that if the bonds of a company were only worth 60, its stock could have any value at all. This view is one which ignores the speculative and uncertain character of a mining venture.

The characteristic feature of mining stock is that the possibility of loss is limited, while the possibilities of profit are practically unlimited. If the views confidently expressed by Mr. Harris in his letter of April 27, 1889 (Rec., 274) were right this stock was worth over $1,000 a share. Time alone could tell whether his views were correct.

If there was only one chance in ten that the stock would attain that value and if all the other chances represented complete failure, still the stock was fairly worth par.

In the case of bonds, on the other hand, the possibility of profit is limited to the rate of interest reserved, enhanced by the discount at which the bond is sold, while the possibility of loss extends to the whole amount in-

vested. Bonds of a mining company which had nine chances out of ten of proving a complete failure would not even be worth sixty.

A coal mine does not involve the same degree of risk as a gold mine, nor is it as secure as a railroad. It occupies an intermediate position. In the case of the Great Western Mining and Manufacturing Company, selling a twenty-year six per cent. bond at 60 meant borrowing money at the rate of about 11 per cent. per annum. That enhancement of the rate of interest represented the premium which an investor would exact for the risk to which his capital was exposed.

Selling stock of the same company at 50 might mean either that in the mind of the purchaser there was more than an even chance that the company would, during a long period of years, earn ordinary dividends on its nominal capital; or it might mean that in the purchaser's judgment there was a better chance than one in ten that it would earn dividends on five times its nominal capital. In the former case the bonds would be a reasonably safe investment; in the latter case they would be an extremely hazardous investment.

There is, therefore, nothing abnormal or indicative of bad faith about the division of the proceeds agreed upon, as between bonds and stocks.

VII.

The bill is not sustainable on the ground that Elliott, Johnson & Co. were deceived.

(a) No such issue has ever been tried.

Elliott, Johnson & Co. are not mentioned in the bill, nor is there any charge of deceit in the bill. It is entirely consistent with the bill to suppose that they knew of all that the stockholders did or intended to do. Whether they did have such knowledge is an issue that has never been tried, because it has never been presented by the pleadings. Henry P. Scott, the only witness who could have shed any light on the question, was not cross-examined (Rec., 25), because the material portions of the bill which his testimony was intended to support were admitted by the answer.

When fraud is relied upon as a ground of liability it should be pleaded. When not relied on as a ground of liability it should not be dragged into a case to obscure the real issue.

Moss *vs.* Riddle, 5 Cranch., 351, 357.
Moore *vs.* Greene, 19 How., 69, 72.
Voorhees *vs.* Bonesteel, 16 Wall., 16, 29.
Beaubien *vs.* Beaubien, 23 How., 190, 208.
Bartol *vs.* Walton & Whaun Co., 92 Fed. Rep., 13.

(b) Elliott Johnson & Co. had no interest in the matter beyond earning their commissions.

Elliott, Johnson & Co. purchased no bonds or stock (Rec., 237); declined to assume any responsibility (Rec., 233); merely put the bonds out over their name and took

their commission partly in cash and partly in stock (Rec., 236). By the subsequent insolvency of the company they may have incurred criticism, but it does not appear that they sustained any pecuniary loss.

The receiver would not be authorized to pay over to them any part of any judgment which he might recover in this suit. The proceeds of such a judgment would become part of the general assets of the corporation for distribution to creditors.

No judgment in this suit could have the effect of barring any claim of Elliott, Johnson & Co. which they might choose to assert in their own name. There is no privity between them and the complainant.

(c) There was no deception in fact.

The evidence shows that Elliott, Johnson & Co. dealt exclusively with John Carlisle. All their correspondence prior to June, 1889, was addressed to him individually and not in an official capacity (Rec., 233–9). They never asked him whom he represented. They knew that the stock sent them for delivery to their customers was stock which had been issued to stockholders to represent surplus earnings invested in improvements (Rec., 23). They knew that it had to be transferred on the books of the company by someone, as attorney for the stockholders, into the names of their customers (Rec., 244 *et seq.*). They recognized, in making their remittances, that the moneys sent to John Carlisle were the proceeds both of stock and of bonds (Rec., 240 *et seq.*). They made no inquiry as to the compensation which the stockholders received for the surrender of their stock (Rec., 23). Their only reliance was on their "understanding" that the

company was to have the benefit of the *proceeds of the bonds*. Mr. Scott's testimony on this subject at page 23 of the record is as follows:

"Q. Was anything said by Mr. Carlisle, or any representative of the Great Western Mining and Manufacturing Company, as to the source from which would come this bonus—the fifty per cent. of stock which was to accompany the bonds?

A. Yes. I made very careful inquiries, desiring that the stock should be issued as full paid and properly issued. Mr. Carlisle stated to me that they could increase their capital by the one hundred and fifty thousand dollars desired, very readily, because the surplus earnings of the company, properly belonging to the stockholders, for many years, had been put back into the company for betterments, and that stock could be properly and legally issued in lieu of such expenditure.

Q. And was anything said as to who was to contribute this stock in the sale of the bonds, whether it was company, stockholder or otherwise?

A. I have no recollection of the legal means that were to be employed in getting the stock out properly, but it was to be stock that belonged to the company, and we were not buying bonds or stock alone, but both.

Q. From whom?

A. From the company.

Q. Was anything said to you by Mr. Carlisle or any other representative of the company about the fact that these stockholders were selling, or were to sell, this stock, one hundred and fifty thousand dollars' worth, to the company, or that the company were to pay the stockholders therefor?

A. I do not know how they proposed to get it out, whether it was to be issued as dividends and then given by the stockholders to the company or not; but I never had the slightest notion that a dollar of the proceeds of the bonds was to be taken out of the company for any individual's use. Every penny, according to our understanding, was to be left for the company uses after the payment of the debts of the company."

This testimony would not support any charge of false representation against Mr. Carlisle, in respect to the division of the proceeds of the sale between bonds and stock. It is not charged that he made any false state-

ment on this subject. At most he merely omitted to inform the brokers, Elliott, Johnson & Co., of the details of their principal's business; details regarding which they made no inquiry, and of which they as brokers had no right to be informed, either by any rule of law or by the customs of their profession.

Nor does it appear that Mr. Scott's "understanding," however arrived at, involved any error of fact. The "proceeds of the bonds" never were taken out of the company for any individual's use, except in payment of debts. Mr. Scott knew full well that the moneys remitted were the proceeds both of bonds and of stock, and he nowhere testifies to any understanding that they were all to be regarded as proceeds of bonds. On the contrary, he expressly says that he never knew whether the company got the stock from the stockholders by gift or otherwise.

The petitioner bases his claim that Elliott, Johnson & Co. were deceived mainly on certain correspondence in which the words "bonus stock" are used, and also upon John Carlisle's letter of April 27, 1889.

This letter (Rec., 258) was written at a time when, according to the way in which both parties viewed the transaction, the company was acquiring its own stock for the purpose of delivery in connection with bonds. The conception of a simultaneous sale through John Carlisle as a common agent had not yet been evolved. The letter of acceptance was intended to give assent to the proposition embodied in Elliott, Johnson & Co's letter of April 18, 1889 (Rec., 233), to which it expressly refers. Taking the two letters together, it is perfectly clear that the proposition which was made and accepted was that

Elliott, Johnson & Co. should undertake to float, for the company, bonds accompanied by 50 per cent. of their par in stock, in such manner as to net the company therefor an amount equal to 85 per cent. of the par of the bonds; Elliott, Johnson & Co. to retain for themselves everything above that amount. The 85 per cent. was to be net to the company for the bonds and stock, but there was no condition imposed as to how the company was to get the stock, or how much it should pay for it.

The petitioner attempts to imply from the word "bonus," frequently used in the correspondence and testimony, an agreement or representation that the stock was to cost the company nothing. No such meaning attaches to the word by usage or authority. On the contrary, in the great majority of cases where the word is used, the context makes it manifest that the "bonus" does cost something to the person who furnishes it.

In *Kenicott* vs. *Supervisors*, 16 Wall., 452, 471, this Court approved the definition of Webster:

> "A premium given for a loan or a charter or other privilege granted to a company; as, the bank paid a bonus for its charter; a sum paid in addition to a stated compensation."

And Mr. Justice HUNT added:

> "It is not a gift or a gratuity, but a sum paid for services, or upon a consideration in addition to or in excess of that which would ordinarily be given."

So in *Dickerman* vs. *Northern Trust Company*, 176 U. S., 181, 202, this Court said:

> "And if it were necessary to the negotiation of the bonds to give a bonus in stock, it cannot be considered in the light of a mere donation."

In *Commonwealth* vs. *Erie & W. Transportation Co.*,

107 Pa. St., 115, the Supreme Court of Pennsylvania said:

"The idea of a consideration is always present when we speak of a bonus."

See also

Consolidated Bank *vs.* State of Louisiana, 5 La. Ann., 57.

Railroad Company *vs.* Maryland, 21 Wall., 456, 473.

Leslie *vs.* Leslie, 50 N. J. Eq., 103.

These authorities show conclusively that there is no basis for the idea that the use of the word "bonus" implies that the subject-matter so designated is to be taken as without value for the purposes of the particular transaction.

Suppose there had been a proposition to give with the bonds a "bonus" in stock of the Chattaroi Railroad Company. Would anyone have been justified in assuming that the Great Western Mining & Manufacting Company undertook to obtain that stock for nothing? If anyone was interested in knowing, and had a right to know, how much of the total consideration paid was to go into the treasury of the Coal Company for its corporate uses, and how much was to go to pay for stock of the Railroad Company, would he not be bound to make the inquiry?

The same principles apply here. Elliott, Johnson & Co. did not take the trouble to enquire into the nature of the arrangement by which stock was furnished them for delivery to their customers. They had, as a matter of fact, no concern with it, unless some of their customers asked for the information which does not appear to have been

the case. It is too late, after the lapse of several years and a complete change of conditions, for them to discover that they were "deceived" about something which at the time was not deemed worthy of a thought or a question.

(d) B. D. Harris never had any communication with Elliott, Johnson & Co. except of the most general nature.

Mr. Scott testified as follows (Rec. 21):

"Q. Did you have interviews with, or communications or data from, parties other than Carlisle representing that company?

A. None whatever, my recollection is, until after the terms had been agreed upon and the investigation was made, and then I met Mr. B. D. Harris once in New York and once in Philadelphia.

Q. Did you meet him prior to the final closing of the negotiations or after they were closed?

A. Subsequent to the closing of the negotiations, and my recollection is that there was no conversation with him except of a general nature and particularly referring to a request we had made, that the company, or several of the individuals associated with the company, should form a small pool to support the securities to be sold after they were listed on the Baltimore stock exchange."

It is probably true that John Carlisle sent to Mr. Harris a copy of his letter to Elliott, Johnson & Co., of April 27, 1899 (Rec., 274), but there is nothing to show that B. D. Harris ever approved of the letter, or that he understood it as introducing any new element not stated in Elliott, Johnson & Co.'s letter of April 18, 1889. Only a few days later John Carlisle writes (Rec., 276):

"Tyler and I worked over those papers constantly for a week and I felt certain you would approve them, but as two heads are better than one, naturally three heads are better than two, and I fear Tyler and I have made some mistake."

John Carlisle was not a general agent for Mr. Harris. He had no authority whatever to represent him except his

written authority to sell stock at 50 in connection with bonds. He had no power to make any representation or create any estoppel that would deprive Mr. Harris of his stock or its proceeds.

If John Carlisle had any general authority to represent any one except himself, it was that attaching to his office as secretary and treasurer of the company. He certainly could not create a cause of action in favor of the company by making false representations in its name and for its benefit. If the company could not sell its bonds without representing falsely that it was entitled to retain the proceeds of stock which went with the bonds, then it ought to have refrained from selling bonds. By no sort of ethical jugglery could the corporation be justified in first making the false representation and then calling on B. D. Harris to make it good.

VIII.

The bill is not sustainable on the ground that purchasers of bonds and stock from Elliott, Johnson & Co. were deceived.

At some stage of this argument we expect to find the petitioner taking the position that the deception charged to have been practiced on the purchasers of bonds and stocks is the one vital and essential element of his cause of action.

We expect to hear it contended that whether the stock in question was issued with or without consideration, and whether the method pursued in selling it was regular or

irregular, if the purpose and effect of the proceeding was to deceive the purchasers of bonds and stock, then the complainant is entitled to relief against the defendants. And we expect to hear it admitted that if those purchasers were not in fact deceived, then there is nothing in the circumstances under which the stock was issued or the manner in which it was transferred which gives any just ground of complaint to the petitioner.

When that stage is reached we desire the Court to observe that the whole burden of the complaint has been shifted upon a single fact which is not alleged in the bill nor mentioned in the proofs, andwhich involves no wrong or damage to the complainant, as receiver, or to the corporation in whose name he sues.

We believe we can show the Court, furthermore, that it was extremely unlikely for any such deception to occur, and that if it did occur it was practically impossible for defendants' testator to have had any knowledge of it or participation in it.

(a) No such issue has ever been tried.

The petition for leave to begin the suit is silent on the point (Rec., 365–6). It goes upon the theory that "certain stockholders and officers" issued stock to themselves gratuitously and immediately sold it to the corporation for cash "as a mere device or instrumentality to abstract said moneys from the treasury of said company." So far from alleging that there was any deception practiced upon purchasers of the stock from the company, *it fails to disclose that there were any such purchasers.*

The bill of complaint goes a little further. It shows that there were purchasers, but does not even hint at any fraud

or deception practiced upon them. The only allegation about the sale is the following (Rec., 4, 5):

> "That thereafter said negotiations for the sale of said bonds were successful, and said bonds were sold for a net price of eighty-five cents on the dollar; that the proposition of sale included a bonus of fifty per cent. of the par value, that is to say, that a purchaser of a bond for $1,000 was entitled to have with said bond capital stock of said company at its par value; that is to say, that a purchaser of a bond for $1,000 was entitled to have with said bond capital stock of said company in the sum of $500; and that thereupon the arrangement was made, in pursuance and as a part of the combination hereinbefore alleged, by the said board of directors and the said stockholders of said company with themselves, whereby said fifty per cent., a bonus of stock, was furnished to said company to fulfill the aforesaid contract for the sale of said bonds, the said directors and stockholders as aforesaid furnishing said capital stock to said company as aforesaid at fifty cents on the dollar of the face value thereof; that the money with which said directors and stockholders were paid on account of said stock was taken by them out of the proceeds of the sale of said bonds."

It would be entirely consistent with the case alleged in the bill if it should turn out to be the fact that all the bonds and stock therein referred to as sold *were purchased by B. D. Harris himself!*

Of course, we do not assert that he was or was not the purchaser. But the failure of the bill to exclude such a hypothesis illustrates in a striking manner the fact that it was not intended to allege, and did not allege, anything whatever about the identity, rights, interests, knowledge or belief of the purchasers.

(b) There is no evidence that any purchasers were deceived.

There is not a word of direct evidence upon the subject now under discussion. Every opportunity to produce such evidence seems to have been shunned by the petitioner. The complainant's witness Scott must have had

personal knowledge as to what representations were made to purchasers. He was not asked a single question along that line (Rec., 18 to 25). It appeared that a printed statement was gotten up with great care and widely distributed, for the purpose of presenting the merits of these bonds and stocks to possible purchasers (Rec., 235, 238). A copy of it was certainly obtainable, and it would have shown very clearly on what grounds purchasers were asked to invest. No copy of this circular was offered in evidence.

At the close of the hearing the complainant's counsel was given a fresh opportunity to formulate the grounds upon which he asked for judgment (Rec., 193). He did formulate his demands with great minuteness, but did not hint at any such ground of liability as is now claimed. There is nothing in the opinion of the learned Circuit Court to indicate that any such claim was called to its attention.

The assignment of errors filed by the complainant (Rec., 195) contains not a word on this phase of the case, and the same is true of the additional assignment of errors filed two months later (Rec., 199).

It is manifest from the record that the whole idea of a fraud practiced upon the purchasers of bonds and stock is an afterthought. An examination of some of the decisions relied on by the petitioner will show how strong was the temptation to inject some such new element into the case in order to afford a color of justification for citing those decisions.

The point was first raised in the Circuit Court of Appeals, and that Court held that there was no evidence of any such deceit as was charged (Rec., 397).

(c) It is extremely improbable that any deception occurred.

In his petition for the writ of certiorari (p. 30) the petitioner asserts, in effect, that no imagination is required to reach the conclusion that if the purchasers of bonds and stocks had known that the directors of the company intended to take $75,000 of the proceeds of the sale in payment for their stock, the purchasers would have refused to make the purchase.

Such a conclusion certainly cannot be reached by any intellectual process. It is a bare assumption of a disputable proposition of fact, which not only has never been tried, but is contrary to all the probabilities of the case. B. D. Harris himself, in 1883, bought bonds and stock of this company without requiring that the proceeds of the stock should go into the treasury of the company. What he was willing to do in 1883, when the fortunes of the company were at their lowest ebb, others may have been willing to do in 1889, when a good dividend on the stock was being earned and paid.

A man who buys bonds or stocks of a going concern, which has been in business for years, does not ordinarily enquire whether he is buying direct from the company or from some intermediate holder. If he purchases from a dealer in investment securities he usually assumes that the latter is the vendor. Rarely, indeed, does he ask the question, Will this money which I am now paying go into the treasury of the company?

We are far from denying that such a question is proper, if he sees fit to ask it. A prospective purchaser has a right to refrain from purchasing, and that carries with it the right to ask any question he chooses before purchas-

ing. Nor do we intend to deny that a false statement in respect to the ownership of stock which is offered for sale would constitute fraud. For many obvious reasons such a statement is material. A purchaser, deceived on such a point, might undoubtedly rescind the contract or sue for damages. It does not appear that any of the purchasers of this stock ever did rescind or ever did sue for damages, and that is an additional reason for believing that none of them were deceived.

If any deception was practiced it must have been by Elliott, Johnson & Company, consciously or unconsciously. They alone were in communication with the purchasers. They knew that the stock transferred to their customers' names had been the property of individual shareholders, and they did not know the nature of the arrangement with the company pursuant to which it was delivered (Rec., 23). If they asserted to their customers that they did know, when in fact they did not know, they were guilty of a direct falsehood. Such conduct on the part of a reputable banking house is not to be assumed on mere suspicion.

It should be remembered that Elliott, Johnson & Company were not in a position to assure their customers, even by inadvertence, that the price paid for bonds and stock went into the treasury of the company. Their plan was to sell the bonds at 95 with a bonus of 25 per cent. in stock (Rec., 236). The evidence shows that they did this with substantial uniformity (Rec., 242, 247). They accounted to the company on the basis of 85 for the bonds with a bonus of 50 per cent. in stock (Rec., 233). In other words, they took profits more nearly resembling those of

underwriters than an ordinary broker's commission, although they expressly refused to accept the responsibility of an underwriter (Rec., 233, 234). It was, of course, impossible for them to assert to their customers that the entire price paid went into the treasury of the company, and it was equally impossible for them to attempt to say what part of the price went to the company without disclosing their own profit, which it is to be assumed they would be very loath to do.

The record indicates that, in selling the bonds and stock, they relied chiefly on the value of the lands, the quality of the coal, the facilities for marketing it, the cost of mining, and the record of net earnings (Rec., 235, 238, 260, 261, 262, 275, 277, 285).

(d) Even if a promise was made to use the proceeds of sale in a particular way, that did not impress the proceeds with a trust.

The petitioner's argument appears to proceed in part upon the theory that if there was a promise on the part of the corporation to use the proceeds of sale of bonds and stock only for the improvement of its property, it would constitute a breach of trust for the corporation to use such proceeds in any other manner. This is contrary to the well-considered decision of Judge WALLACE in

Banque Franco-Egyptienne *vs.* Brown, 34 Fed. Rep., 162.

If it is intended to create a trust there are, of course, many legal and effective ways of doing it; but a mere promise or representation as to the use to be made of money will not have this effect. In the case cited Judge WALLACE said (p. 196):

"If a borrower refuses to keep his agreement with the lender to use

the money borrowed in a particular way, the lender has his remedy at law for breach of contract, or, in an appropriate case, may have relief in equity and compel specific performance. But there is no principle of equity which allows him to pursue the money as a trust fund when the borrower has parted with it to another who has obtained title to it as between himself and the borrower. Even where money has been obtained by deceit, so that in judgment of law the contract of loan is voidable as between the lender and borrower, it cannot be followed by the lender into the hands of one who has received it innocently and with a right to retain it as against the borrower."

In this case the money received for the stock never came into the possession of the corporation. It passed through the hands of John Carlisle, the common agent, directly into the possession of B. D. Harris, who furnished the stock for delivery. The possession of Carlisle, as agent, was the possession of his principals. As to so much of the money as represented bonds, his possession was that of the corporation; as to so much as represented stock, his possession was that of those who furnished the stock.

A promise by the corporation to its creditors that it would get possession of the money of B. D. Harris, and apply it to the improvement of its property, would not impress a trust upon the money in the hands of Harris, or of Carlisle, his agent.

Suppose John Carlisle, after receiving the money, had omitted (pending the advice of counsel) to turn over that part of it which represented stock furnished by B. D. Harris. Suppose B. D. Harris had sued him for it. What defence could he have urged? Entrusted with the possession of stock for sale, he reports the stock as sold and then withholds the proceeds. Could he excuse that sort of conduct on the ground that a question existed

as to the title to the stock, or the illegality of the arrangement, or dishonesty in the method of conducting the sale? Certainly not. Regardless of all such questions the law would have sustained B. D. Harris in saying to his agent, My money or my stock.

Would not the same thing be true if the stock had been delivered to the corporation for the purpose of enabling it to fulfill its contract to furnish a bonus of stock with the bonds? Assuming that such an arrangement was *ultra vires* (although we shall presently show that it was not), could the corporation make use of it to deprive B. D. Harris both of his stock and of the money received for it? Could it justify such a position on the ground that it had made a promise to apply the money in some other way?

By the sale of this stock, in order to enable the corporation to float its bonds, Mr. Harris and his brother lost their voting control of this company. No court can speculate on the question of the extent to which they were prejudiced by such loss of control. Had they retained control *non constat* but that the insolvency might have been avoided. It is not now possible to restore the *status quo*, nor is any offer made to do anything of that sort. If the money agreed upon as representing the value of the stock had been turned into the treasury of the corporation, and B. D. Harris were now presenting a claim for that money, we do not see how the claim could be resisted.

(c) The judgment, if any, recovered by the complainant in this case would not enure to the benefit of those who were deceived.

The cause of action herein is no part of the mortgaged

property. Hence, if anything should be recovered by the receiver, it would be part of the general assets of the corporation, to be equally distributed among all creditors. A glance at the schedules (Rec., 383, 373, 369) will show that many of them are persons having no concern at all with the matter now under discussion. Of the persons who originally bought bonds and stock, there is no way of telling how many continued to be creditors up to the time of the commencement of this suit or the appointment of the receiver. If they sold their bonds, no right of action for deceit or breach of contract would pass with the bonds. Of those who still retain their bonds it is impossible to say how many had actual knowledge of the facts, how many were indifferent to the disposition of the price paid, and how many were actually deceived, if there was any deception, which we, of course, do not admit.

If the complainant receiver should recover judgment on such a ground, he could not go to the Court which appointed him and say, "I brought suit, as directed, for assets fraudulently abstracted from the treasury of the Great Western Mining and Manufacturing Company. I happened to obtain a judgment which was designed to give relief for deceit practiced in 1889 upon A., B., C. and D. by the corporation which I represented. Permit me, therefore, to distribute these moneys among A., B., C. and D. according to their respective rights." Would not the Court be apt to reply, "You are not a receiver for A., B., C. or D; the judgment which you have obtained does not bar them from any right or remedy which belongs to them at law or in equity, nor will it protect

the defendant against their demands, if any they have. The money which a lucky chance has brought into your possession must be distributed as are the other assets of your receivership."

(f) If any fraud was committed, defendants' testator had no part in it.

There is no pretense that B. D. Harris ever had any communication with the purchasers of bonds and stocks (other than himself) or that he ever assented to any such communication, other than that contained in the printed circular which the complainant did not see fit to put in evidence. He entrusted the sale of his stock to competent and reputable brokers, furnished them truthfully with all the information they asked, and relied on them to make no statements of fact which they did not know to be true.

Under these circumstances the false and unauthorized representations of his agent would not deprive him of title to his property or its proceeds.

Greene *vs.* Dockendorf, 13 Minn., 70.

If such representations were made to induce a sale, their falsity might warrant a rescission of the contract; but, if unauthorized, they could expose the principal to no personal liability.

Decker *vs.* Fredericks, 47 N. J. L., 469.
Concord Bank *vs.* Gregg, 14 N. H., 331.
Herring *vs.* Skaggs, 62 Ala., 180.

It is within the scope of an agent's authority to describe the quantity, quality or condition of that which is entrusted to him for sale, but not to disparage or deny

his principal's title or make promises as to what will be done with the proceeds of sale.

(g) If any fraud was committed, it was not injurious to the corporation.

According to the evidence, the bonds could not be floated unless accompanied by stock (Rec., 20). According to the petitioner, the bonds and stock together could not be sold unless the purchasers believed that the stock was costing the company nothing and that the entire consideration was going into the property to enhance the security for the bonds. The company could not get the stock for nothing, because the stockholders would not give it up on those terms. According to the petitioner's most recent view of the case, then, some sort of false representation was absolutely necessary in order to enable the company to sell its bonds.

Assuming that a fraud was committed and that the bonds were sold in consequence of it, how was that an injury to the corporation? Was the company injured because the sale of its bonds was facilitated? The power to borrow money was one of its corporate powers, and presumably everything which enabled the company to exercise its corporate powers more freely and effectually was for its benefit. The company was well able to pay interest on its bonds. In the first half of 1889 it earned more than twice the amount necessary for this purpose (Rec., 295). Yet, if it had been unable to sell its bonds it might have been wiped out, or its business greatly injured, through the enforcement of its floating debt. It would seem that if any fraudulent misrepresentation took place, the Great Western Mining and Manufacturing Company should be the last to complain of it.

The theory of the complainant seems to be that John Carlisle represented to Elliott, Johnson & Company (and through them to the purchasers of the bonds and stock) that the entire proceeds of sale of stock as well as of bonds were to go into the treasury of the corporation for corporate purposes; that B. D. Harris authorized or ratified such a representation and is responsible for keeping it good, and that consequently the corporation can sue Mr. Harris to compel him to put into its treasury the moneys which his agent represented were to go there.

Some of the errors of fact and of law which vitiate this claim have been pointed out in the foregoing argument. We desire now to direct the attention of the Court to the absurdity of the claim that the corporation can compel Mr. Harris to make good a representation made in the course of a transaction to which it was not a party and upon the faith of which it never acted.

The bare statement of such a proposition seems to eliminate it from the discussion. It scarcely seems credible that a suit in equity was ever brought upon such a basis, and it will be remembered that it was not upon any such basis that this suit was authorized to be brought by the Circuit Court for the District of Kentucky. An examination of the books, however, discloses a limited number of cases in which claims of a somewhat similar character to that above stated have been entertained by the courts with sufficient seriousness to receive the condemnation which they logically deserve.

In re Ambrose Lake Tin and Copper Mining Co., L. R., 14 Ch. D., 390.

Parsons *vs.* Hayes, 14 Abb. N. C., 419.

Flagler Engraving Machine Co. *vs.* Flagler, 19 Fed. Rep., 468.
Foster *vs.* Seymour, 23 Fed. Rep., 65.
Tompkins *vs.* Sperry Jones & Co., 96 Md., 560.
Hutchinson *vs.* Simpson, 92 App. Div., 382.

The case first cited arose in the course of the winding up of the company to which it owes its title, out of a controversy between the official liquidator and two individuals named Moss and Taylor. It appeared that these individuals, with some others, were the owners of a mine of the value of about £6,000, which they assigned to a trustee who was under their control. They then organized the Ambrose Lake Tin and Copper Mining Company, designating as directors in the articles of association themselves and two of their associates in the ownership of the mine. These directors proceeded to buy the mine from the trustee for £24,000 in shares of the new company. Of these shares more than £22,000 were turned over by the trustee to Moss and Taylor, and they sold some of them to the public. The object of the transaction was deemed by the Court to be to give the public an exaggerated idea of the value of the property and to induce the purchase of shares at an excessive price. The company was not successful, and at the end of about six years it was wound up by an order of Court.

The official liquidator obtained from the Vice-Warden of the Stannaries Court, who had charge of the winding-up, an order requiring Moss and Taylor to pay up the difference between the value of their shares in the new company, including the profit on those which had been sold, and the value of their interests in the mine. This

amounted to about £17,000. The Court of Appeal in reversing the order, hold that there was no liability.

JAMES, *J.*, said (p. 395):

"In my view the company only gave back in substance that which it was getting, and the fraud was not between the vendors and the company, the purchasers, but was a thing calculated to delude people into believing that the shares, when got, were something more valuable than they really were. What the company lost, if they lost anything, was this: If they had formed the company and issued shares they might have got the fictitious value which the shares would have brought in the market by availing themselves of the lies respecting the property which they say are contained in the contract. That does not seem to me to be a sort of thing which the company would be entitled to claim."

BRETT, *J.*, said (p. 397):

"However improper or disreputable, as my Lord says, this transaction was, it did no mischief to anybody whom the liquidator represents, and it could only do mischief to people who may have been deceived, but we cannot tell now whether anybody has been deceived. Those persons are not before the Court. Therefore the remedy sought here is by the wrong persons and in the wrong form."

COTTON, *J.*, said (p. 399):

"It may be that what was done was done for the purpose of enabling the company to be passed off on the market as something different from what it was. Whether that was so or not is, in my opinion, immaterial to the present question. But if it was so, the remedy is not an action by the company against those who were vendors and purchasers. The remedy is a remedy of each purchaser of shares, if there were any such, who was deceived by the representations made by his vendor as to the constitution of the company.

In my opinion, not only can this order not be maintained, but even if there has been any profit made by the appellants, we are not in a position at the suit and instance of the company in any way to make them account for it."

Parsons vs. *Hayes*, 14 Abb. N. C., 419, was a decision of the General Term of the Superior Court of New York

City upon a demurrer. The plaintiff brought suit as a stockholder of the Vanhuff Mining, Smelting and Milling Company, on behalf of himself and all other stockholders, against the corporation and one Joseph Hayes and others to compel them to account to the corporation for profits fraudulently made through the sale to the corporation, in exchange for $2,000,000 of stock, of property not worth more than $150,000. Plaintiff alleged that he had purchased his stock regularly in the open market, relying upon the representation that it was full paid. He also alleged that the individual defendants had received large gains and profits from the sale of the portion of the stock that was turned over to them. By a separate defense, which was demurred to, it was alleged that plaintiff derived title to his stock from one Catlow, who received it from the company in part payment for property in the course of the transaction referred to in the complaint. The complaint showed that the entire capital stock had been issued to Catlow in payment for said property.

SEDGWICK, *Ch. J.*, thought judgment should be given for defendants on two grounds: first, because the plaintiff had no greater right than his predecessor, Catlow, had to complain of the transaction in which the latter took part second, because the corporation itself would have no cause of action or right to damages. INGRAHAM, *J.*, concurred only on the first of these grounds; while TRUAX, *J.*, dissented. The learned Chief Judge closed his opinion by saying (p. 434):

> "This opinion has had in regard solely the right of a member of a corporation to require that corporation to assert for his benefit a claim for damages in which he may share, when in reality he stands in the shoes of one who took part in the transaction complained of. His want of

right to maintain such an action does not affect any claim he may have for individual damage from misrepresentation by the corporation or third parties, nor does it affect the claim of creditors or the liability of the corporation or its trustees to an action by the attorney-general."

Flagler Engraving Machine Co. v. *Flagler*, 19 Fed. Rep., 468, was a suit brought by a corporation of Connecticut against certain of its directors and stockholders to recover profits realized in the sale of certain stock. The bill charged that the defendants organized the complainant corporation and caused all of its stock, amounting to $300,000 to be issued for patent rights and then turned back into the treasury of the company $25,000 of the stock so issued. The defendants, acting for the company, employed a broker to sell the treasury stock and published advertisements in which the value of the patent was set forth in the most glowing terms. Some positively false and fraudulent statements were made in these advertisements. The shares were offered in Boston and were quickly taken up at prices ranging from $100 to $300 per share, and even more. The demand being so active, the defendants, as directors of the company, passed a vote, while the sales of treasury stock were still going on, to sell 300 shares more. These shares were contributed by the defendants, *pro rata*, and the proceeds were divided among them in the same manner. The money passed through the hands of the treasurer of the company. Certain foreign patents were assigned to the company in consideration of the permission given to defendants to sell some of their own shares in the manner described. The persons who bought stock at high prices afterwards came into control of the company.

Judge LOWELL held that the corporation was not

aggrieved by the facts shown and that those who inspired the suit had mistaken their remedy. At page 470 he said:

> "From this statement of facts it appears that certain persons were probably induced to buy stock by false and fraudulent representations; and for this wrong I do not doubt that there is a remedy. But I cannot see how the company itself can work out the remedy. * * *
>
> The actual fraud was not in fixing the capital stock at a certain sum, but in puffing the property afterwards; and the persons who suffered were those who were induced to buy shares in the market. The shares were not subscribed for at par, but bought. The purchasers, some or all of them, may have a right to set aside the sales, and to recover their money of the company or the defendants, or both, but they are necessary parties to the suit or suits, and they cannot, by obtaining control of the company, set up an artificial case and recover through the company what is really their own loss, from which the company itself was enriched."

Foster vs. *Seymour*, 23 Fed. Rep., 65, was a suit brought by a stockholder of the Central Arizona Mining Company, on behalf of himself and all other stockholders, to compel the trustees of the corporation to account to it for a fraudulent disposition of capital stock. The bill alleged that the entire capital stock, amounting to $10,000,000, was exchanged by the trustees for mining property owned by themselves, the value of which did not exceed $100,000, as the trustees knew. The bill further alleged that the trustees, after such exchange of capital stock, divided and distributed it among themselves and sold it as full-paid stock to innocent purchasers, including the complainant; that the trustees realized large sums of money thereby, which they applied to their own use. Upon this state of facts Judge WALLACE sustained a demurrer to the bill, saying (p. 67):

> "If the original transaction, in connection with the special facts

of a purchase of stock, should operate as a fraud upon a purchaser, the cause of action would be his, and not that of the corporation. The fraudulent character of the transaction was imparted to it by the corporation itself; that is, by those who represented all there was of the corporation. The remedy of the complainant, if he has been deceived into the purchase of stock by false representations as to its value, is against those who have misled him. Even if he could recover against the corporation or against the trustees (see *Fosdick* vs. *Sturges*, 1 Biss., 255), the corporation has no cause of action against the trustees."

Tompkins vs. *Sperry, Jones & Co.*, 96 Md., 560, was a suit brought by the Receivers of the Maryland Brewing Company, of Baltimore City, to compel the defendants to account for the proceeds of certain bonds of the company alleged to have been unlawfully obtained. The bill was dismissed upon demurrer. It alleged that the defendants obtained options or contracts for the transfer of several of the brewing establishments of Baltimore to a corporation to be organized, and which should issue its bonds and stocks in payment therefor; that by the terms of said contracts the aggregate capitalization of the proposed company was limited to $20 of capital for each barrel of output during the preceding year of the various breweries included in the consolidation; that out of the proceeds of bonds and stock a certain working capital was to be provided, and the remainder, after delivery of the amounts called for by contracts to be delivered to the owners of the breweries, was to go to the defendants as compensation for their services and expenses. The bill further alleged that the defendants compelled the Maryland Brewing Company to assume the obligations of said contracts, and that said breweries were in fact transferred to the company, and that bonds were issued to the amount of $7,500,000, when by the terms of the contracts the bonded

indebtedness should have been limited to $5,820,000; that the issue of bonds and stock was authorized by the stockholders by the acceptance of an offer of Sperry, Jones & Co. to transfer the breweries and furnish the cash working capital in consideration of certain amounts of bonds and stock larger than were warranted by the contracts; that at the time of the acceptance of said offer Sperry, Jones & Co. were the real owners of all the corporation's stock, the same standing in the names of their employees as agents; that the surplus of bonds was in part retained by Sperry, Jones & Co., and in part turned over to certain Trust Companies, who were joined as co-defendants, and it was charged that these Trust Companies had realized a profit by the resale of the bonds.

As to the rights of the corporation as representing the brewers who put their property into the consolidation, the Court said:

> "The relations of Sperry and Jones to each of the brewers were, it is alleged in the bill, fixed by a separate contract. Assuming that these contracts called for the delivery by them to the respective brewers of bonds and stock of the company capitalized on a certain basis and that they delivered securities issued upon a different basis of capitalization, that might afford to each individual brewer a right of action against Sperry & Jones for such damage as he suffered under the terms of his particular contract, but these various contract rights of the different brewers cannot be asserted collectively in this suit by the receiver."

As to the rights of those who may have purchased bonds or stock from Sperry, Jones & Company the Court said (p. 583):

> "When Sperry & Jones offered any of the bonds or stock issued to them by the company for barter or sale to other persons and thus, as it were, invited them to become interested in the enterprise, they were bound, as we have already said, to practice no concealments

toward those persons and to give them all desired information as to their own relation to the company; but this, like their duty to the contracting brewers, was an obligation to each person with whom they so dealt and the rights of their several vendees in case of a breach of the obligation are several and according to the nature of the particular transaction and cannot be collectively asserted in this suit."

Hutchinson v. *Simpson*, 92 App. Div. (N. Y.), 382, was an action by certain stockholders of the American Malting Company, on behalf of themselves and all others, to require the members of the firm of Moore & Schley to account to said company for secret profits alleged to have been realized by them as promoters of the company. The complaint alleged that the defendants obtained options on about twenty-five malting plants situated throughout the United States with a view to the transfer of said plants to a proposed corporation; that the defendants also invited the public to subscribe to the stock of the proposed corporation, and that $9,000,000 of preferred stock and $4,500,000 of common stock were subscribed for by means of letters addressed to Moore & Schley, to be paid for in cash to the amount of $9,000,000; and $3,000,000 of preferred stock and $1,500,000 of common stock was also subscribed to be paid for in malting plants; that all these subscriptions were upon the condition and agreement that all of the stock issued by the proposed corporation would be used by Moore & Schley for acquiring the malting plants upon which they held options, and for working capital and for no other purposes; that the defendants caused the American Malting Company to be incorporated and were in absolute control of its board of directors; that said board of directors entered into a contract with an employee of Moore & Schley to issue pre-

ferred stock to the amount of $12,500,000 and common stock to the amount of $13,740,000 in payment for the malting plants and $2,070,000 of working capital; that the $9,000,000 of cash was actually paid in by the subscribers and was sufficient to pay all expenses of acquiring the malting plants (other than those delivered in payment of subscriptions) and furnishing the working capital; that 5,000 shares of preferred stock and 77,400 shares of common stock remained which were not delivered to the subscribers and were not needed for the purpose of acquiring plants or providing working capital; that said shares should have been returned to the treasury of the American Malting Company, but were instead appropriated by Moore & Schley.

A demurrer to the complaint was sustained.

INGRAHAM, *J.*, said (pp. 399, 400):

"If the purchasers of the stock of the defendant company had suffered damage by reason of a breach of a trust obligation which existed as between them and the individual defendants, that they would have a cause of action against the individual defendants cannot be doubted, but that is not this case. The plaintiffs were not subscribers to the stock of the corporation, but purchased it long after it had been issued for property purchased by the corporation. It does not even appear that the stock that they held was a portion of the stock sold by Moore and Schley under the agreement before mentioned. Nor is the cause of action based on a relation of trust between the plaintiffs and the individual defendants. It is the right of the corporation that is sought to be enforced, and the plaintiffs must establish that there was such a relation between the corporation and the individual defendants, and that the defendants violated their duty to the corporation to entitle the plaintiffs to succeed in this action. No subscriber to this stock has complained of any deception or violation of confidence. The corporation got what it bargained for. All connected with it knew of all the facts alleged in the complaint, and neither the corporation nor the subscribers have sought to rescind the transaction."

VAN BRUNT, *P. J.*, took substantially the same view, and PATTERSON, *J.*, said (p. 407):

> "My view is that the corporation which was organized had no right of action against Moore & Schley and that hence these plaintiffs, as stockholders, derive no right of action from that company. If a wrong has been done it is one to be remedied in favor of those who signed Exhibit A, or those claiming directly under them, and there is no complaint emanating from them."

HATCH, *J.*, who dissented, fully recognized in his opinion the principle upon which we now cite the case as authority. He said (p. 420):

> "If fraud be perpetrated in the sale of stock, the action is in deceit, and lies in favor of the individual wronged against the person doing wrong."

IX.

The bill is not sustainable on the ground that B. D. Harris was a promoter, and bound as such to account for profits.

It is conceded that Mr. Harris was not, technically, a promoter. It is not possible to characterize as a promoter a man who buys stock in a company after it has been in existence for twenty-seven years, and who afterwards makes a bargain with the company for the sale of his own private property at a fair price to persons designated by the company, in order to help the company obtain a loan.

But it is claimed that B. D. Harris was subject to obligations analogous to those of a promoter, because he stood in the same relation to future transferees of the rights of the existing stockholders which a promoter occupies towards those who may be induced to subscribe to

the shares of a corporation through his efforts. In the petition for the writ of certiorari the learned counsel for the petitioner inquires (p. 30):

> "Is there any difference between the duties of a promoter and a director except in degree? Which owe the higher duty to the company? Were not these directors promoters of this loan for the company? Could they secretly issue and sell it stock at a profit to themselves without disclosure?"

We are quite willing to concede that there is no difference, not even in degree, between the fiduciary obligations of a promoter of a corporation in the formative stage and those of a director of a company which is fully organized. There is, however, a vast difference between the companies with which they respectively have to do, in respect to legal capacity for making contracts. The difference between the two cases relates not to the position of the trustee, but to that of the *cestui qui trust.*

The distinction is like that between a trustee for adults and a trustee for unborn infants. Both are trustees; and their rights, powers and obligations in that capacity are similar. But in respect to the possibility of contracting with their *cestuis que trustent*, their situations are altogether dissimilar. A trustee for adults may contract with his beneficiary regarding the trust estate if the latter acts intelligently and independently upon a full and fair disclosure of all the facts.

Narcissa's Ex'r *vs.* Wathan, 2 B. Mon., 241.

Pugh's Heirs *vs.* Bell's Heirs, 1 J. J. Marsh, 399.

Spencer's Appeal, 80 Pa. St., 317.

In re Ledrich, 68 Hun, 396.

Graves *vs.* Waterman, 63 N. Y., 657.

Mills *vs.* Mills, 63 Fed. Rep., 511.

A trustee for infants, of course, cannot do this. The infant may disaffirm the contract, even though such disaffirmance amounts to a fraud on the trustee.

McGreal *vs.* Taylor, 167 U. S., 688.
Tucker *vs.* Moreland, 10 Pet., 58.

The special rules of law regarding promoters turn on the principle that while a corporation is in the formative stage, and is inviting the public to subscribe to its stock, those who have caused it to be formed and are in control of its corporate organization cannot contract with it for any private benefit or advantage to themselves in such a manner as to bind future subscribers to the shares without knowledge of all the facts. The rule excludes not only unfair, exorbitant and dishonest contracts, but also those which are fair and reasonable. Any profit or remuneration whatever to the promoter for his services in enabling the corporation to acquire the property necessary for its business, however just or moderate, is voidable by the corporation, if contracted for at this stage of its existence, unless assented to by every subsequent original subscriber to the shares, with full knowledge of all the circumstances.

Yeiser *vs.* United States Board & Paper Co., 107 Fed. Rep., 340.
Hayward *vs.* Leeson, 176 Mass., 310.

The test of liability is not whether the transaction was beneficial to the corporation or the reverse. The only questions are whether the promoter realized a profit, and whether the subsequent original subscribers to shares knew of it and assented to it. In *Yeiser* vs. *U. S. Board &*

Paper Co. (*supra*), the learned Circuit Court of Appeals for the Sixth Circuit said (p. 348):

> "It is said that the property was worth what the company paid for it, and is adapted to the company's requirements. It happens so. But this in no manner affects the operation of the rule."

From this hasty summary of the law in regard to promoters, it may be seen what would be involved in the adoption of the rule proposed by the petitioner, that the relation between a director and future transferees of the outstanding stock is the same as between a promoter and future original subscribers to the unissued stock. It would mean in substance that every transaction between a corporation and one or more of its directors involving any individual profit to the latter would be voidable at the instance of the corporation unless assented to by every future transferee of its stock. Such a rule would not be an extension of the law relating to promoters. It would be a caricature of it.

The "promoter cases" relied upon by the petitioner all turn on the principle that the corporation, while its membership is still incomplete and the public are being invited to pay money into its treasury upon stock subscription, is in a condition of tutelage with limited capacity to contract.

In Lord MacNaghten's opinion in *Gluckstein* vs. *Barnes* (1900) A. C., 248, he thus describes the corporation, in this inchoate condition of its powers:

> "They appoint themselves sole guardians and protectors of this creature of theirs, half-fledged and just struggling into life, bound hand and foot while yet unborn, by contracts tending to their private advantage, and so fashioned by its makers that it could only act by their hands and only see through their eyes."

In *Erlanger* vs. *New Sombrero Phospate Company*, 3 A. C., 1218, Lord CAIRNS said of promoters (p. 1236):

> "They have in their hands the creation and molding of the company; they have the power of defining how and when and in what shape and under what supervision it shall start into existence and begin to act as a trading corporation."

Some of the learned Chancellor's observations in this case are certainly very broad, but it must be remembered that his judgment was to the effect that the transaction complained of had in effect been ratified by the corporation, *after its shares had been fully subscribed*, and on this ground he voted to reverse the order of the Court of Appeal. This excludes the idea that he intended to hold that any further ratification would have been needed if the transaction had taken place *after the shares had been fully subscribed* and the subscribers were in control of the company. Concerning his opinion on this occasion, Lord DAVEY said, in *Salomon* vs. *Salomon & Co.* (1897), A.C.,57:

> "Of course, Lord Cairns' observations were directed only to a case such as he had before him, where it was attempted to bind a large body of shareholders by a contract which purported to have been made between the vendor and directors *before the shares were offered for subscription.*"
>
> (The italics are ours.)

In *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (1899), 2 Ch. 392, one of the most recent and instructive cases on promoters' liability, it was said by LINDLEY, M. R. (p. 428):

> "The Nitrate Company, although in one sense formed when registered, was not completely formed, as contemplated by the promoters, until a prospectus had been issued and a large capital had been subscribed."

London Trust Company, Limited, v. *Mackenzie*, 68 L. T., 380, was not a case of holding promoters liable for

profits, but of holding directors liable for a misapplication of the capital of the company. We shall discuss it, therefore, in connection with the question of directors' liability.

In sharp distinction from the English "promoter cases," of which a great number might be cited, is the case where the organizers of a corporation do not intend to invite the public to become original subscribers, but do intend to acquire all the shares themselves and then to offer their own shares for sale to the public. In that case it is held that each individual sale stands on its own basis of facts, as between vendor and vendee, and the corporation has no concern in it. (*In re Ambrose Lake Tin & Copper Mining Co.*, 14 Ch. D., 390; *In re Innes & Co., Limited* (1903), 2 Ch. D., 254; *Hutchinson* v. *Simpson*, 92 App. Div., 382, 420; *Tompkins* v. *Sperry, Jones & Co.*, 96 Md., 560; *Venner* vs. *Atchison, &c., R. Co.*, 28 Fed. Rep., 581; *Stewart* vs. *St. Louis, &c., R. Co.*, 41 Fed. Rep., 736; *Church* vs. *Citizen's Street R. Co.*, 78 Fed. Rep., 926; *Drake* vs. *N. Y. Suburban Water Co.*, 26 App. Div., 499; *Ban* vs. *Railroad Co.*, 125 N. Y., 263; *Higgins* vs. *Lansingh*, 154 Ill., 301.) Many of these cases are discussed at length under Points (VIII.) and (XIV.).

Hayward v. *Leeson*, 176 Mass., 310, was a case where promoters voted themselves a remuneration for their services before the stock had been subscribed and failed to state that fact in the prospectus. The Court said (p. 319):

> "Payment to promoters of remuneration for their services is not made valid by a vote passed by the corporation when the corporation is in the sole control of the promoters *before the capital has been issued to the public.*"
>
> (The italics are ours.)

And on page 320:

> "The persons to whom the promoters owe the duty which they owe by reason of their fiduciary relation are the persons who put their money into the enterprise at the invitation of the promoters, that is to say, the future stockholders."

The "future stockholders" referred to by the Court are not the transferees of existing stockholders; they are the future holders of the unissued stock which is being offered to the public for subscription. This is evident from the words "persons who put their money into the enterprise at the invitation of the promoters," that is to say, persons who pay money into the treasury of the company. Persons who become transferees of existing, outstanding stock, and who do not pay money into the treasury of the company are not "putting their money into the enterprise." They are buying shares of stock exactly as they would buy any other species of personal property. The money they pay goes to the person whose property they get, and they cannot claim that they have succeeded to the benefit of any fiduciary relation, unless that relation also existed towards the person whose shares they have acquired.

That the Court was using the words "future stockholders" in this sense is evident from what is said in regard to the manner in which promoters may properly obtain remuneration (p. 320):

> "Promoters can make the necessary disclosure of the remuneration they stipulate for by including in the prospectus a full statement thereof; if such a statement is not made therein, they cannot honestly take any remuneration for promoters' services, unless it is voted by the stockholders after the capital stock has been taken by the public."

Here is a plain intimation that assent to the promoter's remuneration by a subscriber to capital stock with knowl-

edge thereof derived from the prospectus, *binds not only the subscriber but all his subsequent transferees.* Otherwise it would be necessary to wait, before actually paying over the agreed remuneration, until it could be ascertained whether or not such subsequent transferees would take with like knowledge; that is, it would be necessary to wait until the liquidation of the corporation and the final distribution of its assets.

It was in regard to the same transaction, condemned in *Hayward* vs. *Leeson*, that the learned Circuit Court of Appeals for the Sixth Circuit, said, in *Central Trust Co.* vs. *East Tennessee Land Co.*, 116 Fed. Rep., 743, 747:

> "This wrong was part of similar transactions which *debilitated the corporation in its infancy* and, we have no doubt, contributed largely to its downfall."

The language of Judge WALLACE, in *Cortes Co.* vs. *Thannhauser*, 45 Fed. Rep., 730, in defining the persons toward whom a promoter stands in a fiduciary relation, is almost the same as that above quoted from *Hayward* vs. *Leeson*. The learned Judge said (p. 739):

> "It is the duty of a promoter *towards those who are invited to co-operate in the enterprise* not only to abstain from stating as a fact that which is not so, but not to omit to state any fact within his knowledge the existence of which might in any form affect the extent or the quality of the advantages held out as an inducement."

Clearly, by the words "those who are invited to co-operate in the enterprise" he meant, as the context indicates, those who are invited to become original subscribers to the stock. He did not mean transferees of stock from the promoter himself, for, in his own opinion, in *Curtiss* vs. *Hurd*, 30 Fed. Rep., 729, he said, in relation to such a transaction (p. 734):

> "It is true that, as a general rule, the shareholder of a corporation is

not held to the liabilities of a member of an ordinary partnership for the debts of the concern, and a purchaser of shares does not expect to incur such a liability as a consequence of his purchase. But it cannot be affirmed that a purchaser of shares who buys without inquiry as to the character of the corporation of which he proposes to become a member, or as to the nature of the liability of the stockholders, has any legal right to complain, if he finds, after he has purchased, that the stockholders are liable for all the debts of the concern. No authority for such a proposition has been cited by counsel. If it can be maintained it can only be done by importing an implied warranty against such a liability into every sale of shares in a corporation. No such exception to the rule of *caveat emptor* is known to the law."

In *Brewster* vs. *Hatch*, 122 N. Y., 349, the learned Court said (p. 362):

"These defendants were the promoters of the corporation and occupied, *before its organization*, a position of trust and confidence towards those whom they induced in invest in the enterprise."

In *South Joplin Land Co.* vs. *Case*, 104 Mo., 572, is an exceeding clear and able statement of the law in regard to promoters' liability and its limitations. The learned Court said (p. 579):

"But the persons who thus project and form a corporation by soliciting and procuring others to subscribe for and take shares of stock, for the purpose of selling or turning over to the company property which they own or have a right to acquire by executory contract, do occupy a double position. On the one hand, they represent their own interest in respect to the disposition of the property. On the other they represent the proposed corporation; and persons who subscribe for stock have a right to do so upon the assumption that the promoters are using their knowledge, skill and ability for the benefit of the company."

In *Yeiser* vs. *United States Board & Paper Co.*, 107 Fed., 340, the learned Court briefly summarized the general doctrine regarding promoters' liability, as follows (p. 348):

"In this country the courts have accepted the essential principle laid down in the English cases and hold, with scarcely any variation, to the

doctrine that the promoter of a company stands in the relation of a trustee to it, *and those who become subscribers to its stock*, so long as he retains the power of control over it."

These cases all recognize the essential difference between inducing a man to become a subscriber to an original issue of stock and inducing him to become a purchaser of stock which has already been issued. In the former case there is an implied representation to every subscriber that he is being brought into the company on terms of equality with all other subscribers; in the latter case there is no implied representation that the purchaser is being brought in on the same terms as though he were an original subscriber, nor that he is being brought in on the same terms as all other purchasers. The law does not invite anyone to believe that the consideration paid upon a sale of stock is governed by anything other than the operation of the law of supply and demand, as applied to that particular transaction. If the purchaser desires anything more he must get a warranty. But the law does warrant a man in believing, when he becomes a subscriber to an original issue of stock, that he is being treated exactly as all other subscribers are treated and that none of his associates, through their dealings with the company, are making profits which are not disclosed to him.

From the nature of the case it follows that when the company has issued all the stock which it intends to issue and the subscribers are in control of the company, the promotion is at an end. As to his future dealings with the company the promoter stands on the same basis as any other individual. If he is a director he is subject to the obligations and limitations of the office. If he is a stockholder he has all the powers and rights and liabili-

ties which attach to that status. If he has made profits by any dealings with the company during the period of promotion he remains liable to account for them, but for the future his liberty of action is as complete as though he never had been a promoter.

Lagunas Nitrate Company *vs.* Lagunas Syndicate (1899), 2 Ch. D., 398, 436.

The fact that a certain part of the authorized capital stock remains unissued, when there is no present intention of issuing such shares, does not invalidate a transaction between a promoter and his company which is assented to by all the subscribers to stock actually issued.

In re British Seamless Paper Box Co., 17 Ch. D., 467.

It follows that whether Mr. Harris be regarded as a promoter or not, the fact that all the transactions in which he took part were assented to by the holders of the entire capital stock of the company, at a time when the company had issued all the capital stock which it intended to issue, precludes any assertion of liability on this ground.

If any "promotion" took place it was in 1889, and Mr. Harris could not be called upon to account for profits on the sale of property which he had owned since 1883, even though the form in which the property was represented had been changed.

Densmore Oil Co. *vs.* Densmore, 64 Pa. St., 43.

In re Cape Breton Company, 29 Ch. D., 795.

In re Lady Forrest (Murchison) Gold Mine (1901), 1 Ch. D., 582.

X.

The bill is not sustainable upon the ground that it is brought for the avoidance of a transaction between the corporation and one of its directors, or to compel a director to account for illicit profits.

In order to succeed in this action the complainant must show that there was some liability attaching to defendants' testator by reason of one or both of the increases of stock, or else that such liability attached by reason of the contract authorized by the directors at their meeting on May 3, 1889, in respect to the sale of bonds and stock.

Defendants' testator is not to be condemned because he subsequently performed or accepted performance of a contract which was lawful and binding on the corporation, when made, and which the corporation could have been legally compelled to perform.

At the time when said stock was issued and also at the time when said contract was made, there were in this corporation seven stockholders and seven directors. All the stockholders were directors and all the directors were stockholders. The transactions now complained of were participated in by all the directors and stockholders except James C. Holden, who had only a nominal interest and who never objected.

Under these circumstances it is too clear for argument

that the ordinary rules regarding transactions between corporations and their directors do not apply.

G. V. B. Mining Co. *vs.* First National Bank, 95 Fed. Rep., 23.

McCracken *vs.* Robison, 57 Fed. Rep., 375.

Barr *vs.* Railroad Co., 125 N. Y., 263.

Battelle *vs.* Northwestern Cement, &c., Co., 37 Minn., 89.

Such transactions, if subject to no other objection than that arising from the conflict of interest between the director and the corporation, may always be ratified by a majority of stockholders.

Twin Lick Oil Co. *vs.* Marbury, 91 U. S., 587.

Hotel Co. *vs.* Wade, 97 U. S., 13.

Pneumatic Gas Co. *vs.* Berry, 113 U. S., 322.

U. S. Steel Corporation *vs.* Hodge, 64 N. J. Eq., 807).

The majority of stockholders could elect a new board of independent directors to confirm the contract, and what they might do indirectly they can also do directly.

Interest in the transaction does not disqualify a stockholder to be counted as part of the ratifying majority.

Gamble *vs.* Queens County Water Co., 123 N. Y., 91.

Northwest Transportation Co. *vs.* Beatty, 12 App. Cas., 589.

U. S. Steel Corporation *vs.* Hodge, 64 N. J. Eq., 807.

Worth, &c., Co. *vs.* Bingham, 116 Fed. Rep., 785.

Even where the corporation refuses to ratify the transaction it cannot retain the directors' property at a less price than he has agreed to accept, unless it is property which he acquired as a trustee for the corporation. In such a case rescission is the only remedy.

Burland *vs.* Earle (1902), App. Cas., 83.

Duncomb *vs.* Railroad Co., 84 N. Y., 190.

Wardell *vs.* Union Pacific R. Co., 4 Dill., 330; 103 U. S., 651.

If rescission is not tendered promptly and the situation materially changes the right to rescind is gone.

Twin Lick Oil Company *vs.* Marbury, 91 U. S., 587.

Kessler & Co. *vs.* Ensley Co., 123 Fed. Rep., 567; 129 Fed. Rep., 397.

Rothchild *vs.* Memphis, &c., R. Co., 113 Fed. Rep., 476.

In this case there was no offer to return the stock which B. D. Harris surrendered, and even if such an offer had been made it would have come too late.

The question whether B. D. Harris did his full duty as a director of the Great Western Mining and Manufacturing Company in respect to the making of the contract of May 3, 1889, may be considered in the light of the question, What would have been the course of an independent board of directors, composed of men of integrity and sound judgment, but with no direct interest in the stock, if they had been in office on that date?

We may assume that if they could have gotten any one to make a *gift*, either of money or of stock, to the com-

pany it would have been their duty to accept it. If they could have gotten anyone to buy bonds, unaccompanied by stock, at a price better than 60, it would have been their duty to do it. But, in the absence of either of these opportunities, how could they have acted more wisely than the board that was actually in office? Stock to the amount of $350,000 was outstanding and the earnings were not sufficient to pay dividends on any more. There was a large floating debt and a necessity for improvements. The directors were confronted by the statement that bonds accompanied by a bonus of 50 per cent. in stock could probably be sold at 85 and that bonds without a bonus of stock probably could not be sold at all. There were, in fact, but three courses for the directors to choose from:

(1) To issue more stock. This, in view of the earnings, would have been injudicious and the directors could not do it anyway without the consent of the stockholders. Chicago City Railway Co. *vs.* Allerton, 18 Wall. 233.

(2) To refrain from selling bonds. This would have left the company exposed to the peril of the enforcement of its floating debt—a peril which subsequent events showed to be real and substantial.

(3) To agree with stockholders to sell their stock in connection with bonds, on the basis of a fair division of proceeds.

The latter course is the one which the directors elected to pursue, and they did it in such a way that all stockholders who desired to participate in the transaction were

treated alike. Unless it was wrong for them to sell the bonds of the company at 60, there was no wrong with which they are fairly chargeable.

London Trust Company, Limited, vs. *Mackenzie*, 68 L. T., 380, which is the principal case cited by the petitioner in support of the proposition that B. D. Harris was liable on account of his conduct as a director, is relevant only to that feature of the conduct of defendants' testator, which consisted in distributing the increases of stock equally among the stockholders. It has nothing to do with the disposition made of the stock after it was distributed. In the case cited, the defendants did not appear to have disposed of any of their own shares. The Court referred to false statements in the registered contract and prospectus, but in the end rendered judgment on the same basis against Sir James Mackenzie, who was not a party to these false statements, as against the other defendants. The case is authority only for the principle that shares and debentures may sometimes be issued in such a way as to expose directors to liability. In the case at bar the gravamen of the charge relates to the manner in which the stock was disposed of, not to the manner in which it was issued. The petitioner very frankly said in his petition for the writ of certiorari (p. 21):

> "They could not even have sold the stock which they legitimately owned in this way, much less that which they took in order to use in this illegitimate way."

London Trust Company vs. *Mackenzie* was not a case of a *pro rata* distribution of shares. It was a case of the issue by the directors of the Barbados Water Supply Company, Limited, to the contractors for the com-

pany's works, of debentures and shares in excess of the amount to which they were entitled, upon the understanding that a portion of the excess should be used in compromising a claim of certain brokers against the company which was entirely without foundation, although some of the directors were interested in enforcing it. The remainder of the excess was intended to be distributed unequally among persons interested in the company, in such a way as to secure their acquiescence in the plan. The Court said (p. 383):

> "These arrangements would, in the aggregate, provide a considerable though not uniform bonus to every holder of any previously-existing share or debenture, and would satisfy the brokers' debt and claims, and would be carried into effect out of the £98,000 new debentures added for this express purpose to the real cost of the works and out of the new shares to be issued to the contractors."

Regarding the claim of the brokers, which was compromised, the Court said (p. 384):

> "The directors gave away the company's money to pay in full a debt which did not exist, and there was not any compromise."

It was not true that all persons interested in the company had knowledge of this transaction and approved it. In answer to such a claim the Court said (p. 385):

> "No doubt most of the holders of shares or debentures existing at the time of the agreements had more or less knowledge of the general purpose of the scheme, but it is not proved that all had such knowledge. No circular explaining the matter was issued, nor was any general meeting called, nor does a mere general knowledge of and assent to the principles of the scheme involve knowledge of the benefit which the directors were to take."

The case differs from the case at bar in the following particulars, among others:

(*a*) It was a case of the distribution of debentures as well as of shares.

(*b*) The distribution was unequal.

(*c*) The distribution was not made by unanimous consent.

(*d*) Such consent as was given was not accompanied by knowledge of the directors' secret profit.

(*e*) The purpose of the transaction was to enable the brokers to obtain an unfair advantage over the stockholders who were not directors.

(*f*) The corporation was in a formative state, with its works uncompleted, and it had shares in its treasury which it intended to issue to the public for cash.

(*g*) The corporation had no fund of accumulated earnings to justify a dividend to its stockholders.

(*h*) The form of the action was not such as to require the Court to distinguish between the corporation's right to damages at law for misfeasance, and the directors' liability to account in equity for illegitimate profits.

(*i*) The defendants were held liable for the value of the debentures improperly distributed; but in respect to the shares the only judgment was a *declaration* that the company had a right to indemnity against the defendants for any loss that the company might sustain by reason of the shares having been allotted as full paid without consideration. In the case at bar it is clear that the Mining Company has sustained no loss by reason of the increase of stock in 1888 and 1889, because nothing is distributable to any of the stockholders and it makes no difference to anyone whether the shares issued pursuant to those increases are deemed outstanding or cancelled. A company cannot have indemnity against loss when there is no possibility of loss.

Christensen *vs.* Eno, 106 N. Y., 97, 102.

XI.

The bill is not sustainable upon the ground that it was *ultra vires* of the corporation to deal in its own stock.

The only doubt which the parties to this transaction had in 1889 about its legality arose from the question whether, if it took the form of a sale of stock to the corporation, such stock would not be cancelled, in legal effect, as soon as the corporation acquired it (Rec. 274). This question was determined in the negative, two years later, by the decision of the Court of Appeals of Kentucky in

Jefferson *vs.* Burford, 13 Ky. L. Rep., 650; 17 S. W. Rep., 855.

In the petition of the receiver for leave to bring this suit (Rec., 365) and also in the bill (Rec., 5) the gist of the offense charged against defendant's testator is *the sale to the corporation of its own stock* as a device for abstracting money from its treasury. The "proposition" presented to the directors at their meeting of May 3, 1889, expressly declared that the transaction should not constitute a sale of stock to the corporation, but should be deemed a sale direct to the individual purchasers (Rec., 352). The receiver, observing the earnestness and impressiveness of this declaration, naturally supposed that he had only to contradict it in order to state a perfectly good cause of action.

The theory of the petition and bill, therefore, is that the transaction complained of, while in form a sale of

stock to the individual purchasers, was in substance a sale to the corporation.

We venture to believe, on the contrary, that if the transaction had been in form a sale to the corporation, this Court would easily be able to see that it was in substance a sale to the individual purchasers of stock. The substance of a transaction is determined by the ultimate result aimed at; not by conditions arising incidentally and temporarily on the way to its accomplishment.

No doubt a purchase by a corporation of its own shares, *prima facie*, is *ultra vires*; and such a transaction may be made a cover for gross wrongs against existing creditors and against non-participating stockholders.

Hall *vs.* Henderson, 126 Ala., 449; 61 L. R. A., 621.

Hope *vs.* International Financial Society, 4 Ch. D., 327.

Trevor *vs.* Whitworth, 12 App. Cas., 409.

Marvin *vs.* Anderson, 111 Wis., 387.

This general rule, however, is subject to numerous exceptions and among others, to these:

(*a*) A corporation may buy its own shares for the purpose of resale, if the transaction is in aid of the exercise of some other corporate power. The test is whether the loss, if any, sustained upon the resale can be deemed an expenditure for a legitimate corporate purpose.

Johnson County *vs.* Thayer, 94 U. S., 631.

New England Trust Co. *vs.* Abbott, 162 Mass., 148; 27 L. R. A., 271.

City Bank *vs.* Bruce, 17 N. Y., 507.

Fremont Carriage Mf'g. Co. *vs.* Thomsen, 65 Neb., 370.

State *ex rel.*, Page *vs.* Smith, 48 Vt., 266.

In re Dronfield Silkstone Coal Co., 17 Ch. D., 76.

In re Balgooley Distillery Co., Ir. L. R. 17 Eq., 239.

(*b*) A corporation may employ its surplus profits, declarable as dividends, in the purchase *pro rata* of its full paid shares for the purpose of retirement. Such distribution of profits among stockholders does not amount to an impairment of capital, and the diminution of the number of shares outstanding is not harmful to any one, so long as the capital is not impaired.

Leland *vs.* Hayden, 102 Mass., 542.

Howe Grain, &c., Co. *vs.* Jones (Tex.), 51 S. W., 24.

State *vs.* Minnesota Thresher Mfg. Co., 40 Minn., 213.

Hamor *vs.* Taylor-Rice Engineering Co., 84 Fed. Rep., 392.

In re Denver Hotel Co., 62 L. J. Ch. (N. S.), 450.

On July 1, 1889, The Great Western Mining & Manufacturing Company had surplus earnings amounting to at least $61,789.37, which in the absence of any stock dividend could lawfully have been declared as cash dividends (Rec., 209 to 212, 295; *supra*, p. 7). The fact that these earnings were drawn from the corpus of the

property did not prevent their distribution to stockholders, in view of the nature of the enterprise.

People *vs.* Roberts, 156 N. Y., 585.

Lee *vs.* Neuchatel Asphalte Co., 41 Ch. D., 1.

Nor was their distribution as dividends forbidden because they had been invested in permanent improvements.

Mills *vs.* Northern R. Co., L. R., 5 Ch., 621.

In re Mercantile Trading Co., L. R. 4 Ch., 475.

So long as the principle of equality between stockholders was observed, no one would have been injured if the distribution had taken the form of a *pro rata* purchase of stock for retirement. If it had been intended to distribute the surplus profits, such a mode of doing it would have been particularly appropriate, where the stock purchased was stock which had been issued as a stock dividend.

But it was not desired to distribute these surplus profits, and the substance of what was intended to be accomplished was not a purchase of stock by the corporation, but a sale of mortgage bonds so as to obtain more money for corporate purposes. To aid in that exercise of corporate power, the company facilitated the transfer of stock from one set of individuals to another, without being under the necessity of employing its own funds in buying the stock and reselling it.

But, we contend, if such a necessity had existed, the corporation would have been justified in employing its funds in that manner. This would have been so even if the resale involved a loss. Here, there was no loss, as the

courts below have affirmatively found, because bonds which could not be sold at sixty, without stock, were floated at that price by the means employed. The corporation was enabled to borrow money on more favorable terms than were otherwise obtainable.

The question whether a transaction is *ultra vires* or not must be judged from its general scope and purpose, not by a critical scrutiny of its details. (*Central Ohio Natural Gas Co.* vs. *Capital City Dairy Co.*, 60 Ohio St., 96; 64 L. R. A., 395.) If the corporation found that it could not sell its bonds without having them printed from engraved plates, it might contract for the preparation of such plates, although not ordinarily authorized to engage in the business of engraving. So, if a circular were needed for the same purpose, the company might lawfully contract for its preparation, printing and distribution, although the business of publishing was not among the purposes named in its charter. And then, if the bonds still could not be sold unless accompanied by railroad tickets, theatre tickets or trading stamps, it would not be an *ultra vires* act to employ the corporate funds in buying such articles, to the extent that they were needed in order to dispose of the bonds.

Would not the same thing be true if it were necessary, in order to sell the bonds, that they should be accompanied by stock of a railroad company or a navigation company? Even though the corporation were without power to buy such stocks for the purpose of investment or control, it would not be prohibited from acquiring and transfering them in aid of some other legitimate exercise of corporate power.

Precisely the same line of reasoning applies when a corporation purchases its own stock. If it is done for the mere purpose of speculation or to sustain the price of the stock in the market or as a means of enabling one or more stockholders to obtain possession of corporate assets, it is clearly *ultra vires*. If it is done for the purpose of resale, so as to aid in effecting a loan, it is legitimate. Neither the corporation nor the stockholder is bound to play into the hands of a middleman. If an advantage is to be had by offering stock and bonds in conjunction, they are not bound to leave that advantage to an individual who is shrewd enough to buy them up and combine them.

In *Johnson County* vs. *Thayer*, 94 U. S., 631, it appeared that a railroad company agreed with a county to complete its road at an earlier date than had been originally agreed upon, in consideration of the surrender by the county of its interest in the railroad company's stock. This court held that it was not *ultra vires* for the company to incur the additional expense involved in constructing its road quickly, and that the surrender of stock to induce it to accelerate the construction was not unlawful.

In *New England Trust Co.* vs. *Abbott*, 162 Mass., 148, the company sued to enforce the provisions of an agreement whereby, upon the death of a stockholder, it was entitled to acquire his shares at an appraised valuation for the purpose of disposing of the same to persons who, from their situation and character, appeared likely to promote confidence in the stability of the institution. It was held that the agreement was not *ultra vires* and would be en-

forced. This is a border-line case, but it is supported by the decision of the Court of Appeal in the matter of *Dronfield-Silkstone Coal Company*, 17 Ch. D., 76, where in order to procure the retirement of a director and promote harmony in the management of the company, the corporation purchased his shares.

In *City Bank* vs. *Bruce*, 17 N. Y., 507, it was held that a corporation could lawfully purchase its own shares with the intention of reselling them, for the purpose of avoiding loss upon a debt. The case has been extensively followed, and rightly so, for the loss, if any, sustained upon a resale of the shares is merely part of the expense of collecting the debt.

In *Dupee* vs. *Boston Water Power Co.*, 114 Mass., 37, a water company offered for sale certain tracts of land for which it had no further use, agreeing to receive shares of its capital stock in payment therefor. The court declined to interfere, deeming the loss, if any, upon a resale of the stock to be merely a part of the expense of marketing the land. This is like the case of *Balgooley Distillery Co.*, Ir. L. R. 17 Eq., 239, where a company had accumulated a large stock of whiskey which it was unable to sell, and it sold a quantity to its stockholders taking payment partly in cash and partly in shares of stock.

In *Fremont Carriage Mf'g Co.* vs. *Thomsen*, 65 Neb., 370, the Court sustained a contract whereby a corporation, for the purpose of obtaining the services of of an employee, sold him stock and agreed to take it back if he was discharged. The loss, if any, sustained upon a resale was merely a part of the expense of procuring the employee's services.

In *Price* vs. *Pine Mountain Iron & Coal Co.*, 17 Ky. L. Rep., 865; 32 S. W., 267, it appeared that a corporation which was desirous of disposing of all its property received offers therefor from two individuals. One of them claimed to have an option, but the other made the better offer. For the purpose of being enabled to accept the latter offer without litigation the corporation agreed with the first bidder to sell him 2,500 shares of its stock at $25 a share. News of the proposed liquidation leaked out and the price of the stock advanced rapidly. The corporation was able to buy only 418 shares in the market. In order to fulfill its contract it purchased the remainder from certain directors who received therefor the corporation's notes at $50 per share, which was less than the shares would have been entitled to receive according to the terms of the proposed liquidation. The transaction fell through and the stock was not resold. The Court of Appeals of Kentucky held that the notes could not be enforced and that the purchase of the stock from the directors was voidable at the option of the corporation. The Court held, in substance, that the purchase of shares for resale was justifiable only in aid of the power and purpose of the corporation to sell all its assets; that the purchase was therefore contingent and dependant upon the making of such a sale. The Court said:

> "Corporations ought not to be allowed to speculate in their own stocks; and while they may not always do an illegal thing in buying in their own stock, such a transaction must be not only in entire good faith, but the exchange must be of equal value, and the transaction free from all fraud, actual or constructive, and when the corporation is neither insolvent nor in process of dissolution; and, further, the rights of creditors are not to be injuriously affected. * * * We may add

to these qualifications that the contract of exchange ought not to be to the advantage of a few favored stockholders, to the injury of the great body of them."

There is very little difference in principle between a corporation's purchase of its own stock and its purchase of stock in another company where the latter form of investment is not permitted by its charter. It has been held repeatedly that a corporation, without express authority in its charter, may acquire shares of stock in another corporation if it is done temporarily in aid of some other legitimate corporate object.

Hodges *vs.* New England Screw Co., 3 R. I., 9.

Howe *vs.* Boston Carpet Co., 16 Gray, 493.

Treadwell *vs.* Manufacturing Co., 7 Gray, 393.

County Court *vs.* B. & O. R. Co., 35 Fed. Rep., 161.

M'Cutcheon *vs.* Merz Capsule Co., 71 Fed. Rep., 787, 792.

Metcalf *vs.* American School Furn. Co., 122 Fed. Rep., 115.

Talmage *vs.* Pell, 7 N. Y., 328.

In this case if any stock was purchased by the corporation it was for the purpose of immediate resale, without loss, and only to the extent that such purchase and resale of stock were actually necessary in order to float its bonds.

Even if the transaction was *ultra vires*, that would give the corporation no right to recover the money paid after the contract had been fully executed on both sides.

Louisville Tobacco Warehouse *vs.* Stewart (Ky.), 70 S. W. Rep., 285.

Thomas *vs.* West Jersey R. Co., 101 U. S., 71.

St. Louis, &c., R. Co. *vs.* Terre Haute, &c., R. Co., 145 U. S., 393.

Central Transp. Co. *vs.* Pullman Palace Car Co., 139 U. S., 56.

Holmes, &c., Mfg. Co. *vs.* Holmes, &c., Metal Co., 127 N. Y., 252.

Metcalf *vs.* American School Furn. Co., 122 Fed., 115.

XII.

The claim for repayment of dividends is not supported by allegations or proof.

The only charge in the bill is that B. D. Harris negligently permitted John Carlisle to pay dividends to persons unknown, such dividends not being earned (Rec., 6). Such a cause of action was not within the jurisdiction of the Circuit Court, sitting in equity (*supra*, Point I [c]), nor would it survive the death of B. D. Harris (*supra*, Point I [b]). There was no allegation that B. D. Harris received any dividends after 1889.

The uncontradicted evidence is that no dividends were paid to B. D. Harris after January 1, 1891 (Rec., 117). After that date Mr. Harris left his dividends with the company as a loan (Rec., 149). The business of the company at that time was profitable. The earnings in 1891 were over $30,000 (Rec., 148). There is no proof of any definite payments of dividends to Mr. Harris or of any definite lack of earnings in any particular year.

There is no allegation in the bill, and there is no proof

that Mr. Harris received payment of any dividends, knowing that they were not warranted by earnings. Such knowledge must be alleged and proved in order to subject a stockholder to liability to repay dividends received.

McDonald *vs.* Williams, 174 U. S., 397.

New Hampshire Savings Bank *vs.* Richie, 121 Fed. Rep., 956.

XIII.

The bill is not sustainable on the ground of liability on stock not full paid.

(*a*) No such claim is within the scope of the order authorizing the suit to be brought (Rec., 366).

(*b*) There is no allegation in the bill that B. D. Harris owned any stock not full paid at the time when the Receiver was appointed or at the time when the bill was filed (Rec., 3).

(*c*) If there were any cause of action on this ground, it would have to be asserted by creditors and not by the corporation (*supra*, Point I. [a]).

(*d*) The evidence shows affirmatively that all the stock issued to B. D. Harris in 1888 and 1889 was transferred by him prior to April 1, 1890 (Rec., 221–223).

(*e*) The claim of liability on this ground is virtually abandoned by the petitioner at page 17 of the petition for the writ of certiorari.

XIV.

The corporation and all its stockholders are estopped from questioning the transactions now complained of.

By invoking the principle of estoppel we do not mean to concede that anything was done by B. D. Harris, in the course of the transactions herein discussed, of which the corporation or any of its stockholders could justly complain, even if not estopped. On the contrary, we have endeavored to show by the foregoing argument that there is no basis whatever for the charges of wrongdoing and breach of trust brought against Mr. Harris by the bill of complaint.

Assuming, however, for the sake of argument, that the facts alleged and proved make out a case, according to the words of the bill, of "depleting the assets" or "abstracting money from the treasury of the company," still we assert that the Receiver cannot complain of the transaction, because the corporation and everyone interested in the corporation is estopped or otherwise debarred from making such a complaint.

(*a*) Prior creditors were all paid (Rec., 140).

(*b*) Subsequent creditors cannot and do not object.

(*c*) All stockholders at the time consented.

(*d*) The present stockholders are bound by the assent of their predecessors in title.

That the present stockholders are precluded from objecting, results almost of necessity from the ruling of this Court in *Graham* vs. *Railroad Co.*, 102 U. S., 148. In

that case it was held that where a corporation, solvent at the time and having no actual intent to defraud creditors, disposes of its property for an inadequate consideration or by a voluntary conveyance, with the assent of all its stockholders, its subsequent creditors cannot question the transaction. The decision in the case cited was based to some extent upon the local law of Wisconsin, where the lands in question were located, but the principle of the decision has since been adopted and relied on as a rule of general application.

McDonald *vs.* Williams, 174 U. S., 397.

Porter *vs.* Pittsburgh, etc., Steel Co., 120 U.S., 649, 673.

Laut *vs.* Manley, 71 Fed. Rep., 7, 18.

Boston, &c., Trust Co. *vs.* Merchants' Telegraph Co., 36 Fed. Rep., 288, 297.

Toledo, &c., R. Co. *vs.* Continental Trust Co., 95 Fed. Rep., 497, 519.

Ready *vs.* Smith, 170 Mo., 163, 175.

Hamilton *vs.* Quarry Co., 106 Wis., 352, 360.

Rollins *vs.* Shaver Wagon, &c., Co., 80 Ia., 380, 390.

Morgan *vs.* Brower, 77 Ga., 627, 635.

It seems too clear for argument that if subsequent creditors have no right to impeach such a transaction, the successors in interest of the assenting stockholders cannot be permitted to use the corporate machinery to accumulate and distribute a fund in which creditors would have no right to share (*Drake* vs. *N. Y. Suburban Water Co.*, 26 App. Div., 499, 514). The decision in *Graham* vs. *Railroad Co.* goes upon the ground that a corporation, by assent or acquiescence, can lose the right to object to

a transaction prejudicial to its interest as effectively as an individual. If the right is so effectively lost that a creditor cannot reach it, it is difficult to imagine upon what theory a subsequent purchaser of stock can claim an interest in it.

The precise question as to the right of a transferee of an assenting stockholder to question corporate proceedings had before he acquired his stock, has seldom arisen in the Federal Courts, because persons who were not stockholders at the time of the transactions complained of seldom become complainants in these courts. There are, however, a number of cases requiring consideration in this connection, in which the status of such a stockholder has been directly or indirectly involved.

Railroad Co. *vs.* Howard, 7 Wall., 392, 415.

DaPonte *vs.* Louisiana State Lottery Co., Fed. Cas., 3,569.

Langdon *vs.* Fogg, 18 Fed. Rep., 5.

Leo *vs.* Union Pacific R. Co., 19 Fed. Rep., 283, 285.

Venner *vs.* Atchison, &c., R. Co., 28 Fed. Rep., 581, 591.

Stewart *vs.* St. L., &c., R. Co., 41 Fed. Rep., 736.

Wood *vs.* Corry, &c., Co., 44 Fed. Rep., 146.

Brown *vs.* Duluth, &c., R. Co., 53 Fed. Rep., 889.

Symmes *vs.* Union Trust Co., 60 Fed. Rep., 830.

Securities Co. *vs.* Louisiana Elec. Light Co., 68 Fed. Rep., 673.

Church *vs.* Citizens' Street R. Co., 78 Fed. Rep., 526, 530.

Railroad Co. vs. *Howard*, 7 Wall., 392, was a case of a foreclosure sale of a railroad by agreement between the mortgagees and the stockholders, the stockholders surrendering their stock and receiving certificates of interest in favor of "bearer," to the extent of 16 per cent. of the par value of their stock, while general creditors were cut off entirely. This Court held that the interest sought to be preserved to the stockholders was subject to the claims of general creditors. Answering the objection that the certificates of interest were negotiable, and might be in the hands of innocent holders, Mr. Justice CLIFFORD said (p. 415):

> "Written contracts are not necessarily negotiable simply because by their terms they enure to the benefit of the bearer. Doubtless the certificates were assignable, and they would have been so if the word bearer had been omitted, but they were not negotiable instruments in the sense supposed by the appellants. Holders might transfer them, but the assignees took them subject to every equity in the hands of the original owner."

In *Da Ponte* vs. *Louisiana State Lottery Co.*, Fed. Cas., 3569, Judge BILLINGS said:

> "There is still another impediment which, it seems to me, stands in the way of complainant's bill. It is the acquiescence on the part of those under whom he claims to derive his title, in this contract and their continued appropriation of its fruits. * * * Every successive shareholder (including the plaintiff's vendor) has assented to it and availed himself of it and it commenced, originally, upon the consent of the whole of the corporate body. No stockholder can now repudiate it as not authorized and not warranted."

In *Venner* vs. *Atchison, &c., R. Co.*, 28 Fed. Rep., 581, the complainant, suing as a stockholder, complained of a transaction whereby the defendant company, having already a capital stock of $34,000,000, doubled it and distributed $15,720,000 of the increased stock among its

stockholders, *pro rata*, without consideration. It was, of course, true that at the time of this issue of increased stock there was an intention to sell shares to subsequent purchasers, and the complainant was one of those purchasers. Judge BREWER said (p. 591):

> "Now, assuming that this action of the defendant Company, in 1881, in doubling its stock, was unauthorized, who may challenge it? Undoubtedly the State can at any time, because it holds a supervising control over the action of all its corporations, and may, by suitable proceedings, compel all to keep within the limits of the powers it has granted to them. So might any one of the then stockholders who did not vote for or voluntarily accept the benefits of such action, providing, at least, he commenced early, and before vast rights and obligations had become vested and assumed on the faith of its validity. No action has been taken by any such parties. The complainant purchased his stock and became interested in the defendant company years after such action had been taken, after it had been acquiesced in by the State and all parties in interest, and after rights and obligations to an enormous amount had been created and assumed on the strength thereof. Indeed, for aught that appears, the stock which he holds may be stock issued solely by virtue of such action, and it would be an anomaly for the holder of such stock to deny the validity of the act which gave it birth, or, with only such standing, be permitted to restrain the full exercise of the powers claimed thereby. Even if we may presume that his purchase was of stock of an earlier issue and of an unquestioned validity, he simply stands in the shoes of one who either directly voted for, or ratified by receiving the benefits of such action, and will not be heard to now question its validity. He bought into the company with full knowledge that the authorized capital stock claimed by this company was $68,000,000; that this amount of stock was authorized by the direct action of a majority of the stockholders, and the ratifying approval of all through their receipt of a proportional share of the increase."

Stewart vs. *St. Louis, &c., R. Co.*, 41 Fed. Rep., 736, was a suit on certain promissory notes of the defendant company given under the following circumstances: One Carter was the owner of a road-bed which cost originally about

$2,000. Two directors of the defendant company bought this road-bed for $15,000 and re-sold it to their company for $200,000 in notes and $3,600,000 in stock. They, of course, had an intention to sell the stock to the public, and it was in the interest of subsequent purchasers of the stock that the corporation afterwards set up a defense against the notes. At the time of the sale there were no stockholders and no stock was at any time issued or subscribed, except the $3,600,000 of stock under the said purchase. The only assets of the company were its charter and the road-bed. The company paid $120,000 of the notes and then defended against the remaining $80,000 on the ground of fraud. Judge FOSTER said (p. 738):

> "All parties—directors and stock holders, assented to it; and, surely, subsequent purchasers of stock, or the corporation itself, cannot now object to it. * * * The records of the company showed the transaction. It was not kept a secret. There was no law compelling any person or municipality to take stock in the company unless they voluntarily chose to do so; and if they were deceived by misrepresentations of the officers their cause of action rests on that deception and not on an attack on the original contract of purchase."

In *Securities Co.* vs. *Louisiana Electric Light Co.*, 68 Fed Rep., 673, Judge PARDEE said (p. 675):

> "I may say, further, that, as a general proposition, the purchaser of stock in a corporation is not allowed to attack the acts and management of the company prior to the acquisition of his stock; otherwise, we might have a case where stock duly represented in a corporation consented to and participated in bad managment and waste, and, after reaping the benefits from such transactions, could be easily passed into the hands of a subsequent purchaser, who could make his harvest by appearing and contesting the very acts and conduct which his vendor had consented to."

In *Church* vs. *Citizens' Street R. Co.*, 78 Fed. Rep., 526, the bill alleged that in 1893 two individuals, McKee

and Verner, purchased the entire capital stock of the railroad company; that through dummies, whom they placed in office as directors, they caused the stock to be increased by 35,000 shares, which were given to McKee and Verner without any consideration whatever; that they caused bonds to be issued and sold, out of the proceeds of which they reimbursed themselves for the entire amount paid for the stock; that they employed artifices known to those who deal upon stock boards to give the bonds and stocks an artificial value for the purpose of unloading them on the public; that plaintiffs in good faith, and without knowledge of this fraudulent scheme, purchased stock of the company in the open market two years later, at the price of 45¼ cents on the dollar of its par value; that some of the stock so purchased was of the original issue, which was lawful, and some was of the subsequent issue, which was fraudulent and illegal, but that plaintiffs were unable to discriminate between the shares. The bill alleged that plaintiffs were willing to turn in for cancellation all the fraudulently issued shares that might be found to be in their possession, and prayed that all other stockholders be required to do the same. JUDGE BAKER, in an oral opinion sustaining a demurrer to the bill, said (p. 530):

> "It is further objected that the plaintiffs in this case, having become purchasers of the stock, although they were good-faith purchasers of it, took it and hold it by no better or different title than the transferor of it to them. It is clear that the shares of stock in a corporation are not governed by the law merchant, nor are they governed by the statute of this State touching bills of exchange and notes made payable in a bank in this State. Securities of that character, in the interest of commerce and commercial dealings, are placed upon such a footing that if they reach the hands of an innocent purchaser

for value, before maturity, the holder acquires them by a new and indefeasible title, which enables him to collect the contents of such bills or promissory notes without regard to the defenses, legal or equitable, existing between the original parties to them. But stocks are *mere choses in action*, governed by the principles of the common law, and by the common law such choses in action are no better or higher evidence of title or right in the hands of an assignee than they were in the hands of the assignor. That is the general rule—a rule that, in my judgment, is applicable to this case—and, without a reference to the adjudications that have been read to the Court, the Court would have reached the same conclusion by the application of the general principles of law with which the members of the bar as well as the Court are familiar. So that in this case I see no principle of the law that would authorize the plaintiffs to maintain the present bill on the ground that the stock that they had purchased, by the transfer or assignment of it, had acquired some new rights or equities that the stock did not possess in the hands of the transferor or assignor."

There is in New York a long line of decisions holding that as to matters affecting the collective interest, each stockholder, irrespective of actual knowledge, is bound by the acts or acquiescence of his predecessors in title.

Kent *vs.* Quicksilver Mining Co., 78 N. Y., 159, 188.
Matter of Syracuse, &c., R. Co., 91 N. Y., 1, 4.
Langdon *vs.* Fogg, 14 Abb. N. C., 435.
Parsons *vs.* Hayes, 18 J. & S., 29, 38.
Hollins *vs.* St. Paul, &c., R. Co., 9 N. Y. Supp., 909.
Drake *vs.* Suburban Water Co., 26 App. Div., 499.
Campbell *vs.* American Zylonite Co., 122 N. Y., 455.
Barr *vs.* Railroad Co., 125 N. Y., 263.
Elyea *vs.* Lehigh Salt Mining Co., 169 N. Y., 29, 33.

The case last cited was a stronger case than that of a mere transferee. It was a case of a pledgee of stock object-

ing to corporate action taken without his knowledge, during the continuance of the pledge, by the pledgor, who was the registered stockholder, consenting to a sale of all the corporate property. The Court said (p. 33):

> "Certainly, what the stockholders might have done by the requisite vote at a formal meeting they might do by agreement between themselves, to which the assent of every one was obtained. They were the corporation and the proprietors of the corporate interests, and, acting collectively, no action of a formal nature could be more binding in disposing of corporate properties. * * * The plaintiff is in no position to object. The statute under which the company was organized recognizes only the pledgor of stock, when it still remains registered in his name on the books, as being competent to vote at corporate meetings, and it follows if his acts in that form would be binding, that a contract with third persons entered into by him, in union with the other stockholders, will be binding on his pledgee and assignee."

In *Drake* vs. *New York Suburban Water Co.*, 26 App. Div., 499, it appeared that a water company, having no creditors and only three stockholders, with the consent of two of the stockholders and without objection on the part of the third, entered into a contract for the construction of its plant. By this contract it was provided that the balance of its entire issue of stock should be paid to the contractors in addition to bonds exceeding in par value the cost of the work. It was held that the transferee of a sub-contractor who received in payment for services rendered some of the stock so issued to the contractor, could not complain that the contract was in fraud of the rights of stockholders. The Court said (p. 510):

> "The company contracted, it obtained that for which it contracted, and no person or corporation then in existence, or which subsequently came into existence as an interested party, can be heard in complaint of a transaction by which no person was defrauded, and each obtained what it contracted to obtain."

In answer to a claim by the sub-contractor that he rendered service directly to the company, and that he stood on the footing of an original subscriber for shares, the Court said (p. 511):

> "But such statement does not change the fact that the work which he did was of a character which Inman Bros. were to perform under the contract. He knew such was the fact, rendered the service and received the pay from the stock which passed through them. Huss, therefore, stood upon no other or different footing than the other holders. His transferee could acquire no other rights than he held. (Cook Stock & Stockh., Sec. 40, and cases cited in note.) If the stock issued to Inman Bros. was invalid, then it follows that the stock issued to Huss was also invalid and could not be made to furnish a basis for this action. We think, however, that this stock was valid at the time of its issue, and in its entirety it remains untainted with any vice."

A like conclusion has been reached by the Courts of last resort in several other states.

Brewing Co. *vs.* Schneider, 110 Mo., 83.

Clark *vs.* American Coal Co., 86 Ia., 436; 17 L. R. A., 557.

Spokane *vs.* Amsterdamsch Trustees, 22 Wash., 172.

Erny *vs.* G. W. Schmidt Co., 197 Pa. St., 475.

Higgins *vs.* Lansingh, 154 Ill., 301.

Trimble *vs.* American Sugar Refining Co., 61 N. J. Eq., 340.

Wells *vs.* Northern Trust Co., 195 Ill., 288, 296.

Hodge *vs.* U. S. Steel Corporation, 64 N. J. Eq., 90.

Home Fire Ins. Co. *vs.* Barber, 93 N. W. Rep., 1024; 60 L. R. A., 927.

McCampbell *vs.* Railroad Co., 111 Tenn., 55.

Marvin *vs.* Anderson, 111 Wisc., 388.

Brewing Co. vs. *Schneider*, 110 Mo., 83, was a case where all the stock of a corporation was owned by three persons. They made an agreement by which two of them were to buy the stock owned by the third, to be paid for in part by the proceeds of a note given by the corporation and the remainder by notes of the purchasers. It was held that payment of the notes out of the earnings of the company could not be successfully assailed by stockholders who inherited their stock from one of the parties, nor by those who became stockholders after the payments were made. The Court said (page 89):

> "We again re-assert the rule that officers of a corporation will not be allowed to deal with the funds and property of the corporation for their private gain, but the rule has no application to a case like the one in hand. Schilling and Schneider had a perfect right to buy the stock. After that purchase they owned all the stock and it was entirely competent and proper for them to agree that it should be paid for out of the earnings of the corporation."

And again at page 90:

> "These plaintiffs are in no condition to complain of that act. Some of them inherited the stock owned by them from Schilling and stand in his shoes, and surely he could not complain of his own act. The assignees from other heirs of Schilling stand in no better position, for they did not acquire their stock until the dividends had been declared and paid."

Clark vs. *American Coal Company*, 86 Ia., 436; 17 L. R. A., 557, arose out of the action of the directors of the defendant company in declaring a stock dividend of 900 per cent., out of which they transferred a large block of stock to the fuel agent of a railroad company for the purpose of influencing him in the purchase of coal. The action was taken upon the consent of all persons then interested in the company. The Court said (page 561):

> "We think the contract at its inception was against public policy,

and voidable at the instance of a party prejudicially affected thereby. We do not, however, think the plaintiff is such a party. Were the conditions now such that because of the reasons for which the contract might be declared against public policy, the plaintiff was liable to prejudice, the Courts would not wait for prejudice to result before granting relief, but would grant the relief to avoid the prejudice. In May, 1889, Wood disposed of his stock, and has not since been connected with the corporation. Nothing in the present organization is against public policy, nor is there anything to satisfy us that the plaintiff has been at any time in the least prejudiced because of Wood's connection with the corporation. Because the contract was in the first instance voidable is no reason for now saying that all acts done in the organization of the corporation, its business, and the disposition of stock and dividends must be declared void without some reason for so doing; and it may well be said in this connection that the plaintiff is not seeking to have the contract declared void. The contract if void would go to the entire transaction of incorporating, for it lies at the very foundation of it, and would nullify the entire issue of stock, including that of the plaintiff."

Spokane vs. *Amsterdamsch Trustees*, 22 Wash., 172, was a case like *Elyea* vs. *Lehigh Salt Company* (*supra*). A pledgee of corporate stock complained of the action of the pledgor in consenting to a sale of all the corporate property. The Court held the pledgee bound by the consent of the pledgor.

In *Higgins* vs. *Lansingh*, 154 Ill., 301, it appeared that one Benson sold to a cemetery corporation, of which he was a manager, with the assistance of two other managers, his equity in certain lands which were subject to indebtedness considerably exceeding their market value. The consideration received was stock and scrip to the amount of $150,000. The scrip represented a conditional interest in 937 shares of stock, which were pledged to secure a part of the indebtedness against the land. The company had no assets other than the lands conveyed to it by Ben-

son. Certain stockholders brought suit to redeem the 937 shares held in pledge, and the suit was defended on the ground that the stock held by complainants was fraudulently issued. The Court said (p. 332):

> "We are of the opinion that it was lawful for Benson, with the consent of his creditors, to devote these lands to the purposes of a cemetery through the instrumentality of this corporation, and, the lands being the only capital of the company and there being then no other stockholders or creditors to complain, to take and receive from the company certificates representing all of the capital stock, even though their face value was far beyond the value of the lands. It was a mere change from private to corporate ownership of the land."

In *Wells* vs. *Northern Trust Co.*, 195 Ill., 288, a foreclosure suit founded upon mortgage bonds issued pursuant to a construction contract was defended upon the ground that said bonds constituted fictitious indebtedness fraudulently incurred contrary to the constitution of Illinois. The Court said (p. 296):

> "The contract with the construction company was authorized by all the stockholders and the mortgage was authorized by the unanimous vote of all the stock of the company. It is not shown that there were then any stockholders or creditors who were injured by this action against their consent. All then interested in the company having assented to the contract and its modification, and to the mortgage and the issuing of the bonds, the company and the successors in interest of the then stockholders are estopped from setting up the inequality or oppressiveness of the construction company's contract."

In *Erny* vs. *G. W. Schmidt Co.*, 197 Pa. State, 475, it appeared that the President of the corporation had withdrawn moneys from its treasury, a large proportion of which he had used for the benefit of the corporation and the remainder for his own benefit. These acts were done without concealment, and the withdrawal of such

moneys had been acquiesced in by the corporation and its stockholders for more than two years. After the expiration of the two years plaintiff purchased stock from an unregistered pledgee of the stock who had participated in the transactions in question. The purchaser, who afterwards became complainant in the suit, was not shown to have had any knowledge of these transactions at the time when he purchased the stock. The Court said (page 491):

> "It is sufficient to say of Erny that as he purchased his stock after the alleged mismanagement had been acquiesced in by the company for a period of nearly two years he has no just cause to complain."

In *Trimble* v. *American Sugar Refining Co.*, 61 N. J., Eq. 340, Vice-Chancellor PITNEY held that upon an application for a preliminary injunction to restrain alleged *ultra vires* employment of the funds of the corporation, the plaintiff, being the owner of only a small portion of the capital stock, ought to show affirmatively that neither he nor his predecessor in title had acquiesced in the policy of which he complained.

In *Hodge* v. *U. S. Steel Corporation*, 64 N. J. Eq., 90, Vice-Chancellor EMERY applied the same rule, saying (page 92):

> "If such previous holders of either the Smith or Curtis shares have assented then neither Smith nor Curtis is entitled to a preliminary injunction against the execution of the plan assented to so far as their rights rest on the ownership of these shares."

In *Home Fire Ins. Co.* vs. *Barber*, 60 L. R. A., 927, the question now under consideration was very carefully considered by the Supreme Court of Nebraska. The Court said (page 935):

> "The fallacy in the view that one who has not been injured by a transaction and is not affected thereby can acquire a right to sue in equity to

set it aside because he has acquired the shares of the person injured, is exposed in the case of Graham *vs.* LaCrosse & M. R. C., 102 U. S., 148, and Hoffman *vs.* Bullock, 34 Fed., 248. The right to complain of such transactions is one which the stockholders injured may or may not exercise, as they choose; where such transactions are not absolutely void they may, if they so elect, acquiesce and treat them as binding. The discretion whether to sue to set them aside or to acquiesce in or agree to them is incapable of transfer."

And again on the same page:

"It appears to be well settled also that stockholders who have acquired their shares and their interest in the corporation from the alleged wrongdoers and through the prior mismanagement have no standing to complain thereof. * * * If a stockholder's predecessor in title has acquiesced in a course of mismanagement, it has even been held that he cannot maintain a suit to restrain its continuance."

In *McCampbell* vs. *Railroad Company*, 111 Tenn., 55, it appeared that the defendant Railroad Company had been exceeding its corporate powers by purchasing and holding the stock of a Land Company and by endorsing notes for the accommodation of such company. The plaintiffs were persons who had acquired their stock from participants in the transaction and they sought by a bill in equity to have the transaction set aside and to recover for the benefit of the corporation the money paid for the Land Company's stock. The Court held that the complainants were entitled to no relief as to past transactions, although they might have a right to enjoin a continuance of such acts in the future. The Court quoted with approval the language of Mr. Morawetz at Section 267 of his work on *Private Corporations:*

"A purchaser of shares acquires no greater rights than the prior holder. If a violation of corporate rights is acquiesced in by all the other holders of stock, the action becomes extinguished thereby and no other holders, present or future, would be entitled to complain."

The views of the leading text writers are all in harmony with those expressed by Mr. Morawetz in the passage last quoted.

In 4 *Thompson on Corporations*, page 3410, the learned author says:

> "But as share certificates do not, under any theory, rise to the grade of strictly negotiable paper, it should follow, and especially in regard of the transfer of any litigious rights which may attach to them, that their holder cannot, by selling them to another, transfer to that other any better litigious rights, inhering in them, than he himself possesses. If, therefore, he has, by his conduct as a shareholder, estopped himself from maintaining a suit in equity to undo corporate action, which he might otherwise have maintained, this estoppel will attend the shares in the hands of his vendee."

In 2 *Clark & Marshall on Corporations*, Section 557, the learned authors say:

> "And it is also established by the weight of authority that a transferee of shares is in the same position as his transferor with respect to suing on account of transactions prior to the transfer, even when he is a purchaser without notice, and that he is estopped to sue therefor without regard to his good faith if his transferor was estopped."

In 2 *Cook on Corporations*, Section 730, the learned author says:

> "Moreover, a stockholder who holds stock which has been voted in favor of the act complained of, cannot bring suit as the holder of that stock. A purchaser or pledgee of stock cannot complain of mismanagement and loss of funds which all the stockholders acquiesced in prior to his purchase or pledge."

Opposed to these authorities is a single American decision, *Parsons* vs. *Joseph*, 92 Ala. 403, which holds that a transferee of stock is not estopped from complaining of corporate transactions acquiesced in by his predecessor in title, where he did not know of such acquiescence at the time he purchased the stock. This was a decision rendered practically on demurrer, and it

did not appear that the corporation had lost its right of action through the acquiescence or consent of all its stockholders, but only that the immediate predecessor in title of the plaintiff was personally disqualified from maintaining a suit. The decision was founded on a peculiarity of the local law of Alabama, whereby a derivative purchaser without notice cannot be affected by notice to him under whom he claims; and if he purchase with notice he may protect himself by the want of notice in his immediate vendor. This principle was first enunciated in reference to lands (*Fenno* vs. *Sayre*, 3 Ala., 458) then extended to slaves (*Weer* vs. *Davis*, 4 Ala., 442; *Horton* vs. *Smith*, 8 Ala., 78) and finally applied to a note and mortgage regarding which the evidence did not show whether or not it was past due when it was assigned (*Martinez* vs. *Lindsey*, 91 Ala., 334).

In England there appear to be but two decisions bearing upon this question. They are opposed to one another in spirit, although not necessarily irreconcilable in regard to the actual point decided.

Ffooks *vs.* London & Southwestern Railroad Co., 1 Sm. & C., 142.

London Trust Co., Ltd., *vs.* MacKenzie, 68 Law Times, 380.

The decision in the case last cited is by WRIGHT, *J.*, and evidently resulted from a failure to discriminate between the particular rights of a shareholder, as against the corporation, in respect to the amount due on his stock, &c., and the collective rights of all the shareholders, as members of the corporation, in respect to matters of their common interest. According to the great weight of

authority, it is only in respect to matters of the latter character that a transferee is estopped by the acts or acquiescence of his predecessor in title, of which he had no knowledge.

Campbell *vs.* American Zylonite Co., 122 N. Y., 455.

Even if it be conceded that the law of England on this question stands in doubt, it is beyond all dispute the settled law of this country that a corporation is estopped from questioning a contract or a transfer of property which was concurred in by all its stockholders at a time when it had issued all the stock which it intended to issue. This principle has become a rule of property and is the foundation of many titles. It cannot be disturbed now without grave injustice.

To hold otherwise would be to deprive corporations of a freedom of action which in some cases may be most necessary for their preservation. A corporation which can do nothing by unanimous consent which it could not do by the bare will of a majority of its members, is poorly equipped to meet financial difficulties and emergencies. To constitute every stockholder a trustee for all his successors in interest would make it perilous for him to give his consent to any corporate action, when a refusal of consent was possible. Those successors in interest are unknown, remote and unascertainable. They have no sympathy with present difficulties, and they have the privilege of ratifying or condemning after the event. A corporation composed exclusively of trustees for such beneficiaries would be a timid and unmanageable affair. An aggregation of distrustful and antagonistic elements, each for-

bidden by ironclad rules to waive anything, or to concede anything, would be poorly constituted to win profit for its members or do service to the State.

XV.

The order of the Circuit Court for the District of Kentucky was not effective to authorize the Receiver to maintain a suit in the name of The Great Western Mining and Manufacturing Company, in the Circuit Court for the District of Vermont.

The Receiver was a mere instrument of the Court which appointed him, for the exercise of its ordinary jurisdiction in equity. The order continuing the receivership *pendente lite* appears in the Record, at page 364. The nature of the suit in which the Receiver was appointed does not appear, otherwise than from a statement in the minute book of the corporation (Rec., 362):

> "Mr. Carlisle reported that his failure had compelled an application to the U. S. Court for the appointment of a receiver of the company, by reason of his name being endorsed on the company's notes for coal purchased and the holders of said notes bringing suits and attachments against the company, the application was made in order to save the property and prevent its being sacrificed."

It is not alleged that any assignment or transfer of its property to the Receiver was ever made by The Great Western Mining and Manufacturing Company. The complete minute book of the corporation is in evidence (Rec., 177, 297 to 364), and thereby it affirmatively appears

that no authority was ever given to the Receiver, by any corporate action, to file this bill in the name of The Great Western Mining and Manufacturing Company. The Receiver has no statutory title to the property of the corporation, nor any statutory right to sue in its name. The only justification of the Receiver's action in making use of the name of the corporation for the purpose of this suit is found in the order of the Circuit Court for the District of Kentucky, as follows (Rec., 367):

> "And it appearing to the court that it will be for the advantage of the said company that suit shall be instituted against the stockholders and directors of the same for the recovery of the sums so represented to be lost, it is therefore directed that said receiver proceed in his own name as receiver, or in the name of the company as he may be advised to recover said sums."

There were both stockholders and directors of this corporation in the District of Kentucky at the time said order was made; but, so far as the record shows, no proceedings were instituted in said district, in pursuance of said order. But in the District of Vermont a bill was filed in the name of The Great Western Mining and Manufacturing Company, not authenticated by its seal nor verified or signed by any of its officers. The signature to the bill was (Rec., 7):

> "The Great Western Mining and Manufacturing Company,
> By L. C. Black, its Receiver,
> By Dillingham, Huse & Holland,
> Plaintiff's Solicitors."

Both in the bill itself (Rec., 7) and at sundry stages in the progress of the cause (Rec., 27, 31, 195, 198), and in his petition to this Court (p. 2), the receiver claimed to have authority, by virtue of the above-mentioned order,

to conduct this cause as complainant, in the District of Vermont, even to the extent of signing an appeal bond in the corporate name (Rec., 198).

Now the act of signing the name of another, without his consent, to a bill of complaint or to an appeal bond, is an act which requires affirmative justification. When the act is done in the District of Vermont, and the object of the act is to get possession of property having a situs in said District, and the justification relied on is the official character of the Receiver and the order of the Circuit Court for the District of Kentucky authorizing such act, obviously the question arises whether or not the court last mentioned has power, for such a purpose and in such a manner, to invest its agent with authority for the performance of an official act in a foreign jurisdiction.

The Circuit Court for the District of Kentucky was not advised by the receiver's petition that any action by the receiver outside the District of Kentucky would be necessary. Its order did not expressly authorize such action outside the District. The order was one which could have been acted on within the District. There was clearly no intention on the part of the Circuit Court to exceed its jurisdiction, and therefore its order cannot be construed as authorizing the filing of the present bill unless it was actually within the power of the Court to affect the possession of property having a situs in Vermont, by determining the question, who should be empowered to sue therefor. The right to sue involves the right to demand; the right to demand implies the right to receive. Therefore an order of the Circuit Court for the District of Kentucky, if such an order had been made, determining the

question as to who should bring suit for this property in Vermont would be sustainable only on the theory that the Court had jurisdiction to determine who should ultimately receive possession of the property in Vermont.

The powers of the Court are not enlarged by acting through an agent. The Court cannot empower its officer to accomplish a result which it is beyond the Court's jurisdiction to accomplish, merely by instructing its officer to clothe his official acts in a new form of words. No matter what form a receiver's proceedings may take, if they are justifiable only by reason of his official character, they are subject to all the inherent limitations affecting the jurisdiction of the Court by which he was appointed. The receiver cannot shelter himself behind his official character as an excuse for acts which otherwise would be unlawful, while at the same time he disregards the limitations by which the jurisdiction of the appointing court is circumscribed.

The petitioner recognizes the general principle that the Circuit Courts of the United States have no power by direct decree to affect the title to or the right to possession of real or personal property outside their respective districts. He recognizes also the principle that receivers appointed by these courts, in the exercise of their general jurisdiction, have no extra-territorial power of official action. But he claims, in effect, that these rules are subject to an exception sufficiently broad, in its practical operation, to nullify both rules. He claims that the Court, by appointing a receiver and by investing such receiver with the power to use the name of a party to the suit may, in effect, enable such receiver to do officially in a foreign

jurisdiction all that any party to the suit could there do in his individual capacity.

Such an exception to the accepted rules of jurisdiction can be justified only on the ground of comity. When an act is done in any jurisdiction which is unlawful there, unless justified; and when the jurisdiction relied on is the order of a court of some other jurisdiction, the question whether such order shall be deemed effective to justify the act is a question of comity. We are brought back, therefore, by the petitioner's contention to the precise question which was decided by this Court, after great deliberation, in *Booth* vs. *Clark*, 17 How. 322.

The principal question in that case was whether the courts of the United States should adopt the rule of comity, which was alleged to be practiced by the courts of England, in respect to giving an extra-territorial effect to foreign judicial decrees and provisional remedies in cases of bankruptcy and insolvency. The precise question in that case related to the right of the receiver of the property of a judgment debtor appointed by the Court of Chancery of New York in a judgment creditor's suit, to maintain a suit in the Circuit Court of the United States for the District of Columbia to recover the judgment debtor's share in a claim upon Mexico which had been adjudged in his favor by Commissioners acting pursuant to a treaty. That the receiver was without power to maintain such a suit, unless by comity, was a proposition which this Court did not regard as open to debate. Mr. Justice WAYNE, after tracing the course of the decisions in England upon this point, said (p. 336):

"So the law stood in England until the case of *Folliot* vs. *Ogden*, 1 H.

Bl., 123, when Chancellor Northington stimulated it into a larger comity by giving effect to a claim of the creditors of a bankrupt in Amsterdam over an attaching creditor in England, who had proceeded after the bankrupt had been declared to be so by the proper tribunal in Amsterdam. England had just then become the great creditor nation of Europe, and of her provinces in North America. Her interest prompted a change of the rule, and her courts have ever since led the way in extending a comity which had before been denied by them."

The learned Justice then proceeded to show that this Court was not constrained, by judicial precedent, or by any settled course of practice in this country, to adopt the English rule. He then referred to the inconvenience which might result from the operation of the proposed rule of comity (p. 337):

"The courts of the United States will not subject their citizens to the inconvenience of seeking their dividends abroad, when they have the means to satisfy them under their own control. We think that it would prejudice the rights of the citizens of the States to admit a contrary rule. The rule, as it is with us, affords an admitted exception to the universality of the rule that personal property has no locality, and follows the domicile of the owner. This Court, in Ogden *vs.* Saunders, 12 Wheat., 213, disclaimed the English doctrine upon this subject; and in Harrison *vs.* Sterry, 5 Cranch R., 289, 302, this Court declared that the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States."

The practical objections to the proposed rule of comity were stated at greater length on pages 338 and 339, as follows:

"We think that a receiver could not be admitted to the comity extended to judgment creditors, without an entire departure from chancery proceedings, as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his

subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court; and that it would be difficult to do, where it may be asked to be done, without the court exercising its province to determine whether the suitor, or another person within its jurisdiction, was the proper person to act as receiver."

The Court concluded that the receiver appointed by the court of chancery of New York had no standing to maintain his suit in the District of Columbia, and that the learned Circuit Court was right in dismissing the bill.

The decision in *Booth* vs. *Clark* has not been generally followed in the courts of the several States. A majority of them have their own rule of comity, sometimes clearly defined, and in other cases loose and uncertain. In some States a foreign receiver may sue, provided he shows by his bill that there are no domestic creditors who can be prejudiced by the suit. In other States there is a race of diligence. If the domestic creditors get into court first they will be protected; but if the foreign receiver sues first, the Court will not stop to inquire whether there are any domestic creditors. In Massachusetts, according to the allegation of the petitioner, the exercise or non-exercise of comity depends upon the employment of a form of words, not affecting the substantial rights of any one. In other States, for all we know, it may depend on the condition of the weather or the personal opinion of the particular judge who happens to hear the case. In *Alderson on Receivers*, § 228, is an interesting collection

of cases from State courts, showing the chaotic condition of the decisions on this subject. They are unworthy of discussion in detail, because they are incapable of shedding any light upon the rules of law applicable to those courts in which *Booth* vs. *Clark* was of binding effect as an authority.

It may be observed, however, that the States which were first to adopt this rule of comity, and which have been most emphatic in commending it, are those which occupy a position somewhat analagous to that of England in 1811, as stated in the above-quoted opinion of Justice WAYNE.

In the Federal courts it has never been doubted that *Booth* vs. *Clark* was conclusive against the right of receivers to sue in the courts of the United States, outside the State or district in which they were appointed.

Brigham *vs.* Luddington, 12 Blatchf., 237.
Kittel *vs.* Augusta, &c., R. Co., 78 Fed. Rep., 855.
Hazard *vs.* Durant, 19 Fed. Rep., 471.
Philadelphia, &c., Iron Co. *vs.* Daube, 71 Fed. Rep., 583.
Wigton *vs.* Bosler, 102 Fed. Rep., 70.

The only Federal case to the contrary, *Hale* vs. *Hardon*, 95 Fed. Rep., 747, was overruled in *Hale* vs. *Allinson*, 188 U. S., 56, and *Hilliker* vs. *Hale*, 117 Fed. Rep., 224 (certiorari refused, 188 U. S., 739).

In *Hale* vs. *Allinson*, 188 U. S., 56, the suggestion was made by counsel that the authority of *Booth* vs. *Clark* had been weakened by the passage of time and by the numerous

decisions in State courts recognizing a rule of comity whereby receivers were permitted to sue outside the jurisdiction of the courts which appointed them. But this Court said:

> "We do not think anything has been said or decided in this Court which destroys or limits the controlling authority of that case."

Mr. Justice PECKHAM then quoted from *Booth* vs. *Clark* the following words, among others, in regard to the powers of a receiver (p. 68):

> "He has no extra-territorial power of official action; none which the Court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek."

And the learned Justice added:

> "This statement has not been overruled or explained away by any subsequent decision of this Court to which our attention has been called."

In *Hilliker* vs. *Hale*, 117 Fed. Rep., 220, it was said by the learned Circuit Court of Appeals for the Second Circuit (p. 224):

> "We are further of the opinion that the plaintiff cannot maintain this action. He sues as receiver. His rights, if any, rest wholly upon the order and decree in the Rogers Case. Without regard to the nature of the claim asserted against the defendant, the plaintiff has no relation to that claim otherwise than through such order and decree. He is not the assignee of all or any of the creditors. He has no title to anything, so far as appears, except to his office of receiver. The order and decree, in terms, make him a mere agent of the Minnesota court. That court undertook to authorize him to sue non-residents in other jurisdictions; moneys collected to be 'held by him subject to the further order of this court (the Minnesota court) in the premises.' The Minnesota court thus attempted to send its agent to collect money by suit outside of its jurisdiction, and to bring it back to be disposed of as it might direct. If it

had had power to transfer the claim against the defendant to the plaintiff, and had in fact so transferred it, he could assert the title thus acquired and sue upon such claim here in accordance with the principles stated in Association *vs.* Rundle, 103 U. S., 222, 26 L. Ed., 337. Apparently the court had no such power. Whether it had or not, it did not attempt to exercise it. It transferred nothing to the plaintiff. It merely appointed him its own agent to collect and hold subject to its order. He was made an arm of the court, with which the court attempted to reach outside of its territorial jurisdiction, and the attempt, it seems to us, was futile. The court could not reach beyond the limits of its jurisdiction through a receiver any more than it could through a marshal or a sheriff. The authority which it sought to give to the plaintiff became a dead letter when he passed beyond the boundaries of the State. This is substantially what was held in Booth *vs.* Clark, 17 How., 322, 15 L. Ed., 164, which has never been reversed."

With the conclusion thus reached this court declined to interfere upon a petition for certiorari (188 U. S., 739).

Constrained by the authority of *Booth* vs. *Clark*, the courts of the United States have built up a system of procedure for dealing with the affairs of insolvent corporations, which rests upon firmer ground than that of comity, and which avoids the practical objections pointed out in *Booth* vs. *Clark*, while securing to foreign creditors reasonable facilities for the collection of their debts. The system which has thus been evolved has the spirit of comity, but is made effective through the exercise by each court of its own jurisdiction, rather than by the abdication of jurisdiction on the part of any court in favor of another. Some cases which illustrate its growth and the principles upon which it proceeds are:

Parsons *vs.* Charter Oak Life Ins. Co., 31 Fed. Rep., 305.

Mercantile Trust Co. *vs.* Kanawha, &c., R. Co., 39 Fed. Rep., 337.

Platt *vs.* Philadelphia & R. R. Co., 54 Fed. Rep., 569.

Central Trust Co. *vs.* East Tennessee, &c., R. Co., 69 Fed. Rep., 658.

Ames *vs.* Union Pacific R. Co., 60 Fed. Rep., 966.

Bayne *vs.* Brewer Pottery Co., 82 Fed. Rep., 391.

Sands *vs.* E. S. Greeley & Co., 88 Fed. Rep., 130.

Reynolds *vs.* Stockton, 140 U. S., 254.

In re Brant, 96 Fed. Rep., 257.

Shinney *vs.* North American Savings, &c., Co., 97 Fed. Rep., 9.

Coltrane *vs.* Templeton, 106 Fed. Rep., 370.

Lewis *vs.* American Naval Stores Co., 119 Fed. Rep., 391.

Conklin *vs.* United States Shipbuilding Co., 123 Fed. Rep., 913.

In *Parsons* vs. *Charter Oak Life Ins. Co.*, 31 Fed. Rep., 305, where it was found that the contract rights of policy-holders required that all the assets of the corporation, wherever situated, should be collected into one fund and be equally distributed among the policy-holders, according to their respective rights, without regard to residence, it was held that the proper method of giving effect to such contract rights, as to assets situated in the southern district of Iowa, was to appoint a receiver ancillary to the receivers appointed by the court of the corporation's domicile, and to authorize such receiver to take possession of the assets, convert them into money, and remit the proceeds to the court of primary jurisdiction.

In *Mercantile Trust Co.* vs. *Kanawha, etc., R. Co.*, 39 Fed. Rep., 337, it was held by Justice HARLAN and Judge JACKSON, sitting together in the Circuit Court for the District of West Virginia, that ancillary receivers could be appointed only upon a regular bill of complaint, showing the equities of the complainant and investing the Court with jurisdiction to determine the incidental questions attaching to its possession of the property. Mr. Justice HARLAN said (p. 340):

"The request that this Court will simply confirm the appointment of a receiver, made in another circuit, and by its order invest that receiver with the possession and control of the mortgaged premises within this district—no other relief being contemplated—is, in effect, a request that this Court will compel all who have claims and rights in respect to the mortgaged property situated in West Virginia, to seek relief in the original suit for foreclosure pending in another State; and this, notwithstanding such parties may have the right, under existing legislation, to invoke the jurisdiction of this Court, or of some court of general jurisdiction established in this State. It might be well if Congress would so enlarge or regulate the jurisdiction of the courts of the United States as to enable a circuit court in which is brought an original suit for the foreclosure of a mortgage resting upon an interstate railroad to take actual possession, by its officers of the entire line, and of all the mortgaged property, wherever situated, and administer it for the benefit of all concerned; preserving in that mode the unity of the railroad, and the just rights of mortgagors, mortgagees, creditors, as well as those of the general public interested in commerce among the States. But there has been no such legislation, and we do not see our way clear to effect any such result by judicial orders merely.

A good deal was said at the argument about the injury that might possibly ensue to mortgagors, mortgagees, creditors and the public if an interstate railroad, covered by one mortgage, be placed under the management of different receivers, each acting under the orders of the Court appointing him, and sold under separate decrees, rendered in distinct foreclosure suits, brought in different circuit courts of the

United States. Undoubtedly railroad property of that kind could be very materially injured in value, and the general public put to serious inconvenience, if the courts in which such separate suits are brought decline to act in harmony, or according to some fixed plan, in the administration and sale of the property. It is not, however, to be assumed that this Court, if its jurisdiction is properly invoked in reference to this railroad, so far as it lies in West Virginia, will fail in any duty imposed upon it by law, or the comity prevailing between courts of equal dignity and authority."

The conclusion here stated was followed in *In re Brant*, 96 Fed. Rep., 257.

In *Platt* vs. *Philadelphia, &c., R. Co.*, 54 Fed. Rep., 569, it appears to be the practice in the District of Massachusetts and in many other districts to appoint ancillary receivers *ex parte* and without a close scrutiny of the bill of complaint.

In *Ames* vs. *Union Pacific R. Co.*, 60 Fed. Rep., 966, the respective rights and powers of the court of primary jurisdiction and of the courts exercising auxiliary jurisdiction were considered by Judges CALDWELL and SANBORN. The latter said (p. 974):

"It is unnecessary to discuss or decide here whether the circuit court sitting in Colorado or Wyoming is a court of ancillary jurisdiction in the matter of this receivership. These receivers were first appointed in this court sitting in Nebraska. So far as the general management of the trust imposed upon them, the general operation of the railroad system in their charge in this circuit, and their general accounting, is concerned, they must report to and be governed by this court sitting in Nebraska. The impracticability of properly administering this great trust under any other practice, and the intolerable confusion which would result from contradictory orders regarding these subjects made in the different districts in the circuit, will commend this rule of practice to every judge within the jurisdiction, and prevent any interference or modification of the orders issued in these matters by the Circuit Court for the district of Nebraska, except by appeal or upon rehearing; but the circuit courts in

the districts of Colorado and Wyoming have jurisdiction to hear and determine the claims of the citizens of those districts against the insolvent corporation and the receivers of it, and their determination of those matters will be equally respected by the court sitting in Nebraska. Citizens of one district will not be required to go to another district to assert their claims against receivers appointed by the courts of both districts."

In *Central Trust Co.* vs. *East Tennessee, &c., R. Co.*, 69 Fed. Rep., 658, it was held to be within the province of the Court exercising auxiliary jurisdiction to determine questions of priority of lien as against assets in the possession of the ancillary receiver. Judge NEWMAN said (p. 666):

"The rights of parties under the local law may be better ascertained in their respective jurisdictions than they would be if sent, as a whole, to the court of primary jurisdiction."

In *Bayne* vs. *Brewer Pottery Co.*, 82 Fed. Rep., 391, upon a question as to the personnel of the ancillary receivership, the learned Court quoted with approval from *Beach on Receivers* as follows (p. 395):

"A feature of ancillary receiverships is that the same person is generally, although not always or necessarily, appointed receiver. Thus his power becomes co-extensive in every jurisdiction wherein he is appointed, and a complete and uniform management of the property is secured."

In *Sands* vs. *E. S. Greeley & Co.*, 88 Fed. Rep., 130, the principles controlling upon Federal courts when their powers are invoked in aid of a receivership originating in some other court are stated by Judge WALLACE as follows (p. 132):

"When the administration extends over assets located in several jurisdictions it is often convenient to apply, in advance, for the assistance of the different courts; hence the practice has become common of applying for auxiliary or ancillary appointments. When such an application is made, the court to which it is addressed exercises its

own original jurisdiction. The decree in the court of the domicile of the corporation is evidence in every other state that the corporation is insolvent, and that a proper case exists in that state for the appointment of a receiver, and it is to be respected accordingly, in obedience to the constitutional provision whereby full faith and credit is to be given in each state to the records and judicial proceedings of every other state of the Union. But it is for the court to which the application is made to decide what remedy it should extend in the particular case, and whether the proper administration of the assets requires the appointment of a receiver. Ordinarily, in comity to the proceeding of another court of co-ordinate jurisdiction, it will appoint an ancillary receiver, and assume administration in aid of the primary receiver (Trust Co. *vs.* Miller, 33 N. J. Eq., 155). When it appoints a receiver the officer becomes its officer, and is completely amenable to its control, and it mattters not whether he is called an ancillary receiver or merely a receiver. His title to the assets within the jurisdiction is derived from its decree, and does not depend upon comity. The assets are in its custody, and are to be disposed of as equity and the orderly adminstration of justice require. Its judgments and decrees in respect to these assets must be accepted as conclusive by all other courts. 'Where a receiver, administrator, or other custodian of an estate is appointed by the courts of one state, the courts of that state reserve to themselves full and exclusive jurisdiction over the assets of the estate, within the limits of the state.' Reynolds *vs.* Stockton, 140 U. S., 254, 11 Sup. Ct., 773. It rests in the discretion of the court appointing the receiver whether the assets within its jurisdiction shall be distributed under its own direction or shall be transmitted to the primary receiver. U. S. *vs.* Coxe, 18 How., 105. It is eminently proper that claimants residing within its jurisdiction should be relieved from the expense and inconvenience of proving their claims in other jurisdictions, and that provision should be made for securing to them equality of distribution in respect to the whole assets of the corporation; but there is no hard and fast rule to control the discretion of the court in making such distribution of the assets as shall be just to all creditors, and ultimately effect a ratable distribution of all the property of the corporation."

In *Reynolds* vs. *Stockton*, 140 U. S., 254, this Court had occasion to consider the extent to which the court of

primary jurisdiction is bound by proceedings in other jurisdictions, to which ancillary receivers are made parties. Mr. Justice BREWER, delivering the opinion of this court, said (p. 272):

> "Where a receiver or administrator or other custodian of an estate is appointed by the courts of one State, the courts of that State re serve to themselves full and exclusive jurisdiction over the assets of the estate within the limits of the State. Whatever orders, judgments or decrees may be rendered by the courts of another State, in respect to so much of the estate as is within its limits, must be accepted as conclusive in the courts of primary administration; and whatever matters are by the courts of primary administration permitted to be litigated in the courts of another State, come within the same rule of conclusiveness. Beyond this, the proceedings of the courts of a State in which ancillary administration is held are not conclusive upon the administration in the courts of the State in which primary administration is had. And this rule is not changed, although a party whose estate is being administered by the courts of one State permits himself or itself to be made a party to the litigation in the other. Whatever may be the rule if jurisdiction is acquired by a court before administration proceedings are commenced, the moment they are commenced, and the estate is taken possession of by a tribunal of a State, that moment the party whose estate is thus taken possession of ceases to have power to bind the estate in a court of another State, either voluntarily or by submitting himself to the jurisdiction of the latter court."

In *Shinney* vs. *North American Savings, &c., Co*, 97 Fed. Rep., 9, it was held to be right for a federal court to appoint an ancillary receiver in aid of a suit instituted in a state court of another state. The learned Court said (p. 11):

> "It is admitted that when a receiver is appointed by a federal court, other federal courts, through comity, will usually appoint the same person as receiver of the assets within their jurisdiction; but it is argued that where the appointment is first made by a state court, federal courts are without power to act in conformity with the principle of comity.

No reason for such a distinction is apparent. The state court is of co-ordinate jurisdiction in such matters with the federal court sitting in the same locality. As between the parties, its determination of the insolvency of the corporation and of the need for a receiver is just as conclusive as if had in a federal court. The need for a uniform administration of the assets of an insolvent corporation inheres in the principles of equity, and does not vary with the forum first invoked. It is no unusual thing for a federal court to appoint an ancillary receiver of assets within its jurisdiction in aid of a primary appointment by a state court of another state."

In *Kirker* vs. *Owings*, 98 Fed. Rep., 499, the Circuit Court of Appeals for the Sixth Circuit considered the limitations upon the relation of comity existing between the court of primary jurisdiction and the courts exercising auxiliary jurisdiction, and held that such comity must yield before the duty of a court which authorizes receivers' certificates, to preserve a fund for their payment. The learned Court said (p. 511):

"Undoubtedly, it is necessary that in the management of large properties, extending through various districts, as a unit, there should be one court to determine the general policy thereof; and comity requires that all the other courts should yield on such matters to the opinion of the court of original jurisdiction. But this does not prevent each court, in respect of claims against a receiver which are purely local in their character, from protecting persons who, on the faith of the Court's credit, have advanced money or goods or rendered service to the trust. In such a case comity must yield to justice and right."

In *Coltrane* vs. *Templeton*, 106 Fed. Rep., 370, the learned Circuit Court of Appeals for the Fourth Circuit discussed the nature of these so-called "ancillary bills" and the necessity for entertaining them. The learned Court said (p. 374):

"The bill in this case is styled an 'ancillary bill.' Technically it is not an ancillary bill. The term 'ancillary bill' is applicable to a proceeding growing out of original proceedings in the same Court, dependent on

such proceedings, and instituted for the purpose of enforcing the judgment, or of rendering complete justice among all the parties in interest. Instances of a bill of this character can be found in Freeman *vs.* Howe, 24 How., 450, 16 L. Ed., 749; Railroad Co. *vs.* Chamberlain, 6 Wall., 748, 18 L. Ed., 859; Minnesota Co. *vs.* St. Paul Co., 2 Wall., 609, 17 L. Ed., 886; and Krippendorf *vs.* Hyde, 110 U. S., 276, 4 Sup. Ct., 27, 28, L. Ed., 145. It is more properly an auxiliary bill filed to assist another circuit court in the administration and distribution of assets in a cause properly before it. The circuit courts of the United States, by reason of the comity existing between them, entertain such bills, and give all the assistance in their power to the court in which the bill was filed originally."

And again on page 375:

"Corporations like the defendant at bar do business in many states, and their assets consist of mortgages, loans, and perhaps other property, in the states in which they do business. It is necessary for the purpose of collecting in their assets that proper parties to sue should be in existence. The receiver appointed in the Maryland district has no extra-territorial existence. Booth *vs.* Clark, 17 How., 322, 15 L. Ed. 164. It therefore becomes necessary that a receiver should be appointed in the districts in which these assets are, and to this end these auxiliary suits are filed. The circuit courts of the United States almost invariably (though there are exceptions) appoint the same receiver whom the court which first took jurisdiction appointed. This is from comity. It is not a matter of absolute right."

In *Lewis* vs. *American Naval Stores Co.*, 119 Fed. Rep., 391, Judge SHELBY passed on several important questions relating to the rights and powers of receivers, acting under an ancillary appointment, saying, among other things, at page 397:

"This procedure and practice of bringing auxiliary suits originated from the limitations imposed upon the territorial jurisdiction of the Circuit Courts, and from the fact that many railroads run into or through two or more states, constituting one property and one continuous line. 2 Bates, Fed. Eq. Proc., 617; Southern Ry. *vs.* Carnegie Steel Co., 176 U. S., 257, 20 Sup. Ct., 347, 44 L. Ed., 458; Farmers' Loan & Trust Co. *vs.* Northern Pac. Ry. (C.C.), 72 Fed., 26. While the

practice is especially applicable to such cases in which the title to real estate in different jurisdictions will be conveyed, it is applied also to cases involving the property of corporations engaged in business and owning property in different judicial districts and in different states. The courts in which the auxiliary suits are brought are entirely independent in fact of the court of primary jurisdiction. The end to be secured—the collection of all the assets of the corporation, and their uniform and equitable administration and distribution—moves the discretion of the Court to treat its jurisdiction as ancillary, and to aid in the collection of the assets, and to transmit them to the court of primary jurisdiction; and this course secures equality among creditors and stockholders and economy in the administration."

In *Conklin* vs. *United States Shipbuilding Co.*, 123 Fed. Rep., 913, Judge PUTNAM makes plain the distinction between that false comity which amounts to nothing more than indifference as to the possible rights of domestic creditors, and the true comity existing between the Federal courts, whereby they give each other intelligent aid in the administration of estates having a situs in a plurality of jurisdictions, while taking scrupulous care to preserve the rights of those who have the first claim upon their consideration, viz., the residents of their respective districts. The learned Judge said, in the course of an oral opinion (p. 915):

"The rule of so-called comity has little influence with me.

The best late writer on international law—Dicey—says very truly: 'The term "comity," as already pointed out, is open to the charge of implying that the Judge, when he applies foreign law to a particular case, does so as a matter of caprice or favor.' It is rather a scapegoat, an opportunity of escape for the Court. I know of few propositions that now come before the courts which are not governed by law, and in this case I must be governed by the law as practiced, and by the precedents, and not by any mere matter of comity. The law, as recognized in the Circuit Courts of the United States is that, when the Federal Court of jurisdiction at the domicile of the corporation appoints a receiver, or makes a decree

winding up a corporation and disposing of its assets, a decree of foreclosure, or any other decree looking to a disposition of its property, thereupon, assuming that to aid another federal court involves a federal question which will lawfully support the exercise of jurisdiction by the federal judiciary, the Circuit Courts in other circuits will exercise ancillary jurisdiction, and assist in carrying out the purpose of the court at the place of domicile."

These decisions afford an outline of a system of procedure which, while perhaps not complete or incapable of improvement, is far superior to that which this Court was urged to adopt in *Booth* vs. *Clark*. It is a system now universally understood. It works smoothly in practice. It effectively protects the rights of possible creditors in each jurisdiction where assets are found, by compelling the foreign receiver to give reasonable security and to submit himself to the orders of the local court before removing assets which may be needed to meet the claims of domestic creditors. It provides a convenient forum in which such creditors may prove their claims. It enables the receiver appointed by a foreign court, without delay or publicity or unreasonable expense, to qualify himself to collect or impound assets properly forming part of the estate under administration. It avoids unseemly conflicts of judicial authority. It provides a central tribunal for the determination of those questions of general policy which must be decided with reference to a great system of railways or a great business undertaking, while leaving to local tribunals full power over questions of a local nature. The courts of the several states and the legal profession throughout the United States are gradually conforming their practice to the standard thus established.

It is true that in state courts the system of ancillary

receiverships does not work as smoothly and easily as in the federal courts, for the reason that in the state courts the rules of procedure in equity are not uniform, and the principles applicable to the jurisdiction of courts of law and equity vary with state boundaries. Nevertheless, it may safely be said that even in New York, or New Jersey or Massachusetts, receivers appointed in other jurisdictions, having occasion to collect assets in those states by legal process, customarily obtain ancillary appointments before bringing suit in the state courts.

This practice is one which operates most favorably in the interest of those creditors whose claims are not of sufficient magnitude to make it worth while to prove them in a distant tribunal. It makes little difference to the creditor with a large claim, where he has to go to prove it. But the small creditors must get relief in their local courts or get none at all.

The petitioner has chosen to depart from the established and universal practice of federal courts in this regard, for no reason that has been or can be assigned, other than a desire to vary the monotony of equity practice in the District of Vermont. A system of procedure which has been carefully built up by the labors of federal judges in the last half-century, for the protection of the rights of small creditors, the petitioner now asks to have destroyed in order that he may be relieved of the consequences of his attempted innovation.

There can be no doubt that the exception contended for by the petitioner, if sanctioned by this Court, would destroy the whole system which now prevails for administering the affairs of insolvent corporations. However easy

it may be to obtain an appointment as ancillary receiver, it is still easier to use some one else's name as plaintiff in a suit. A receiver is not going to submit himself, unnecessarily, to the control of a court of the locality where he sues, when by slightly varying the phraseology of his bill he can absolve himself from such control.

It must not be forgotten that in the United States are many corporations which conduct their business at a distance from the states or territories by which they are created. All over the country are corporations organized under charters granted by Maine, New Jersey, Delaware, West Virginia, South Dakota and Arizona. When such a corporation encounters financial difficulties, a receiver is very naturally and properly appointed by the court of its domicile. Oftentimes the fact that an application for the appointment of receivers is impending is known only to the largest creditors. If the order appointing receivers could be so drawn as to bring about an immediate withdrawal of all the movable assets from the places where the corporate business has been conducted to the place of the corporation's domicile, great hardship would often result to those creditors least able to bear it. No argument or illustration is needed to show who would be hurt by such a procedure. And yet, on the theory proposed by the petitioner, such a result could not be avoided.

If the right to sue in the corporate name can be conferred on a receiver to take effect in a foreign jurisdiction, then the right to demand and receive possession of assets can likewise be conferred. The right to sue involves the right to collect the judgment; and the right to obtain

possession of assets by suit, for the purpose of removal from the State, implies the right and the duty on the part of the custodians of corporate property to make a voluntary delivery of such assets, for a like purpose.

But it is claimed that the right of the Court appointing the receiver to authorize him to sue in the name of a party is absolute, and does not rest on comity. Therefore, it is said, it is a right which must be recognized regardless of consequences. This view involves a radical misconception of the general powers of a court of equity, in regard to the appointment of receivers. A receiver may be appointed in a proper case for property and effects within the territorial jurisdiction of the Court. But the Court can no more invest the receiver with the name, identity and citizenship of a party for the purpose of suit in a foreign jurisdiction than it can confer on him a defendant's complexion, reputation, chirography or good health. Courts of equity have no such powers. As was said by this Court in *In re Sawyer*, 124 U. S.. 310:

> "The office and jurisdiction of a Court of equity, unless enlarged by express statute, are limited to the protection of rights of property."

Doubtless it will be argued that the Court has power to compel a party to assign a chose in action to a receiver, and also to direct the receiver to bring suit in a foreign jurisdiction on such assigned cause of action. Therefore, it will be said, the Court may accomplish the same result by an order directing the receiver to sue in the party's name without an assignment.

That argument appeared to this Court in *Booth* vs. *Clark* as one which cut both ways. It was considered in that case that the existence of a lawful method for reach-

ing assets in a foreign jurisdiction was an additional argument against the employment of an unlawful method (17 How., 339). If an assignment is made, it will have such effect only as is permitted by the laws and the public policy of the place where the assignment is to operate. If it is there deemed legally injurious to domestic creditors they can have their remedy in the ordinary course of judicial procedure to set it aside as in fraud of their rights. But such a remedy, invoked against an order of the Circuit Court of the United States, would be anomalous and most injurious to the dignity of the Court. A system of procedure which invites such attacks is not one to be commended.

It may further be said that inasmuch as the corporation might maintain the suit on the ground of diversity of citizenship, the defendant is not harmed if someone else sues in its name. That argument would be equally available in favor of any one who might choose to employ the corporate name for such a purpose, even though destitute of official authority. What if the corporation should afterwards choose to sue by a bill filed by its proper officers and authenticated by its corporate seal? Could the prior pendency of a suit begun by a receiver in the corporate name, with no better authority than an order of the Court of another jurisdiction, be successfully pleaded in abatement? Suppose, in this case, creditors residing in Vermont had obtained or were to obtain the appointment of a receiver of the property of The Great Western Mining and Manufacturing Company, situate in said district. Would the pendency of this suit, or any judgment obtained herein, be pleadable as a defense to a suit by such a Vermont receiver? Evidently not, unless the orders of

the Circuit Court for the District of Kentucky and the official acts of its receiver are to have an extra-territorial effect which does not belong to them under the decisions of this Court.

We have discussed the question of the receiver's right to maintain this bill in the form in which it was filed, because it is a question in the case and a part of the decision of the Circuit Court of Appeals; not because we desire to avoid a decision on the merits as to the alleged grievances set up in the bill. On the contrary, we should welcome such a decision; but we do not feel that the desire of these parties to have an adjudication upon the merits of their controversy ought to lead this Court into sanctioning a course of procedure which could not but be attended, for a long time to come, with the most mischievous consequences.

XVI.

The judgment of the Circuit Court of Appeals should be affirmed.

Dated April 5, 1905.

JULIEN T. DAVIES,
BRAINARD TOLLES,
Of Counsel for Respondents.

Supreme Court of the United States.

No. 217.—October Term, 1904.

The Great Western Mining and Manufacturing Company, by L. C. Black, its Receiver, Petitioner, vs. Charles A. Harris et al., Executors of D. B. Harris, deceased.	On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 29, 1905.]

This case was begun by bill in equity filed in the Circuit Court of the United States for the District of Vermont in the name of the Great Western Mining and Manufacturing Company, a Kentucky corporation, by L. C. Black, its receiver, against B. D. Harris, a citizen of the State of Vermont. It is averred that the corporation was duly organized under the laws of the State of Kentucky. In substance the bill sets forth: That the Great Western Mining and Manufacturing Company was organized by the Kentucky legislature on January 19, 1856, for the purpose of owning and operating mining property and selling coal. On or about February 10, 1859, it became the owner of coal properties to the value of about $40,000, situated in Lawrence County, Kentucky. The capital stock of said company was $200,000, divided into 2,000 shares of $100 each. That previous to November 10, 1887, the capital stock of the company was owned as follows:

B. D. Harris, the defendant herein, 600 shares, par value	$60,000 00
G. D. Harris, 600 shares, par value	60,000 00
John Carlisle, 440 shares, par value	44,000 00
George W. Carlisle, 300 shares, par value	30,000 00
James C. Holden, 4 shares, par value	400 00
Loren Hinsdale, 4 shares, par value	400 00
George S. Richardson, 52 shares, par value	5,200 00

On November 10, 1887, the stockholders increased the capital stock in the sum of $50,000, the same being distributed among the stockholders as follows:

To B. D. Harris, 150 shares, par value	$15,000 00
To G. D. Harris, 150 shares, par value	15,000 00
To John Carlisle, 110 shares, par value	11,000 00
To George W. Carlisle, 75 shares, par value	7,500 00
To George S. Richardson, 13 shares, par value	1,300 00
To James C. Holden, 1 share, par value	100 00
To Loring Hinsdale, 1 share, par value	100 00

[The record shows that this increase was in fact made on January 11, 1888, in pursuance of a meeting authorized to be called at that date in the meeting of November 10, 1887, and certificates issued January 14, 1888.]

On April 22, 1889, a further increase of capital stock was had by adding 1,000 shares of $100 each, which was distributed as follows:

To B. D. Harris, 300 shares, par value	$30,000 00
To G. D. Harris, 300 shares, par value	30,000 00
To John Carlisle, 220 shares, par value	22,000 00
To George W. Carlisle, 150 shares, par value	15,000 00
To George S. Richardson, 26 shares, par value	2,600 00
To James C. Holden, 2 shares, par value	200 00
To Loring Hinsdale, 2 shares, par value	200 00

The complainant avers that at the time the increases of capital stock were made and carried out the stockholders had formed a plan of issuing bonds and selling the same, and that the issues and distribution of said stock were made for the purpose of defrauding said company, and obtaining without consideration the aforesaid shares of capital stock, and for the purpose of selling the same to the company in connection with the said loan, and defrauding the company out of a part thereof. That said issues of capital stock were made by the shareholders and board of directors, of whom the defendant was one, ostensibly in consideration of alleged betterments of said mining property, which betterments, it was pretended, were made and paid for out of the net earnings of the company, which it was represented had increased the value of the property belonging to the stockholders. Complainant alleges that no such betterments had been made, and if made they were paid for out of money borrowed upon the credit of the company, for which an indebtedness then existed and still exists. That in fact there had been no net earnings which had been put into betterments by the company, and that the issue of said stock was without consideration, illegal and void, and a breach of duty upon the part of the stockholders and the directors of the corporation to its creditors. That said stock so issued still remains outstanding in the names of the parties to whom it was issued or their assignees. That on May 13, 1889, the directors of the company, of whom the defendant Harris was one, and who were also stockholders in the company, for the purpose of defrauding said company and abstracting the assets of the company for their own use and benefit, the corporation then being insolvent, without means to pay its floating indebtedness, which then amounted to $100,000, or more, agreed that they would obtain a loan of $300,000 for said company, said loan to be evidenced by bonds to the number of 300 in the denomination of $1,000 each, to be secured by mortgage upon the property of the company. That the issues of stock had been made upon the consideration that certain betterments had been added to the property, and had been paid for out of the

profits of the operation thereof, which profits would otherwise belong to the stockholders, when in truth and fact the said company was largely insolvent and had a mortgage debt of about $60,000 upon it and a floating debt of $100,000 or more. In fact, said company had not made any net profits whatever, and said betterments had not been made at all, or, if made, had been paid for out of the earnings of the company, and no consideration than that herein stated was ever paid by the stockholders for the stock issued to them. That it was for the purpose of carrying out the scheme of abstracting from the company money arising from the sale of the bonds, and for that purpose only, that said stock was issued to the defendant Harris and others. That said bonds were sold at a price of eighty-five cents on the dollar, including a bonus of fifty per cent of the par value of said bonds in the stock of the company; that is, a purchaser of a $1,000 bond was entitled to have with said bond $500 of the capital stock of the company. That in pursuance of the combination aforesaid the said directors and stockholders furnishing said bonus stock were paid for the same from the proceeds of the sale of the bonds. The stock was furnished as follows in pursuance of the said arrangement:

By B. D. Harris, 450 shares, par value	$45,000 00
G. D. Harris, 450 shares, par value	45,000 00
John Carlisle, 336 shares, par value	33,600 00
George W. Carlisle, 225 shares, par value	22,500 00
George S. Richardson, 39 shares, par value	3,900 00

That out of the proceeds of the sale of the bonds the sum of $75,000 was distributed among the parties, as follows:

To B. D. Harris, the defendant herein	$22,500 00
To G. D. Harris	22,500 00
To John Carlisle	16,800 00
To George S. Richardson	1,950 00
To George W. Carlisle	11,250 00

That, as a matter of fact, when the stock was contributed the company was insolvent, and could not carry on its business without making the said loan; that said stock was worthless and was sold to the company at fifty cents on the dollar for the purpose above mentioned, and thereafter said stock was transferred to the purchasers of the bonds. Then follow allegations as to the mismanagement of the company, and the wrongful payment of dividends, and the averment that on or about September 12, 1892, one of the creditors of the company was compelled to make an application to the United States Circuit Court of Kentucky, wherein a request was made for the appointment of a receiver of the property and franchises of the company for the purpose of realizing its assets and distributing them among its creditors; that in said proceedings all of the property of the Great Western Mining and Manufacturing Company was sold and was found to be of the value of $75,666.66, which left a large floating indebtedness of about $90,000, be-

sides a large balance due upon the bonded indebtedness, aggregating about $270,000; that, in said proceedings in the United States Court for the District of Kentucky, L. P. Black was appointed receiver of the assets of the company, for the purpose of realizing upon the same for the benefit of its creditors, and it is averred that by special order of the United States Court said receiver had been directed to prosecute this suit, either in his own name or that of the company, as may be proper. The prayer of the bill is for an accounting respecting the matters and things set up in the bill, and that the defendant be required to pay to the complainant the sums which may be found to be due by reason of the matters and things set forth, and for general relief. An answer and replication were filed, and the issues made up were heard upon the pleadings and testimony. The Circuit Court found the estate of B. D. Harris, he having died pending the suit, liable in the sum of $15,000, being the amount Harris received from the company in exchange for the 300 shares of stock issued to him in April, 1889, and held that the estate was not liable on account of the amounts received by him for stock previously issued to him, and was not liable to account for the amounts taken by other officers, directors or stockholders of the company. The case in the Circuit Court is reported in 111 Fed. Rep. 38. Upon cross appeals the Circuit Court of Appeals for the Second Circuit reversed the judgment of the court below upon the ground that the Circuit Court had no jurisdiction of the action, as the same could not be brought by the receiver in the name of the corporation, and if it could be maintained by the corporation, or in its behalf, no case was made for a recovery, because of the consent of the stockholders to the transactions complained of. (128 Fed. Rep. 321.) The order appointing the receiver in the Circuit Court is found in the record, and is as follows:

"The above cause coming on this day to be heard upon the motion of complainant for appointment of a receiver and having been fully heard and considered, it is ordered by the court that said motion be granted, and that the order hereinbefore entered, appointing L. C. Black as temporary receiver, be continued, and said L. C. Black be and he is hereby appointed receiver of all the property, rights in action, choses in action, and all assets of every description, of the defendant, The Great Western Mining and Manufacturing Co., with all the powers and authority conferred by the order appointing him temporary receiver herein; and that he is to act and continue to act under the orders hereinbefore made, and that he hold and keep the property and assets arising from the funds of said business, or that may come into his hands, subject to such order as may be made from time to time; and it is also ordered that he shall have power to purchase such current supplies as are or may be needed in the proper conduct and operation of the business of said company."

The application for the order to bring this action sets forth:

"The receiver represents that he has ascertained from the books and records of the Great Western Mining and Manufacturing Company, in

his possession, that, in connection with the floating of the loan of $300,000 in the year 1889, upon the property of the Great Western Mining and Manufacturing Company, situate in Lawrence County, Kentucky, certain stockholders and officers of said company combined to obtain for themselves, and did so obtain, proceeds resulting from the sale of said bonds in the sum of $75,000, which money belonged to and should have been paid into the treasury of said company.

"Your receiver says that he finds shares of capital stock of the Great Western Mining and Manufacturing Company were issued at the instance of and through the action of certain of said stockholders and officers of said company, to the amount of $150,000, which said stock was distributed among said stockholders and officers; that as your receiver is informed and believes there was no consideration for the issue and distribution of said stock; that the said stock was sold by said stockholders, so as aforesaid receiving it, to the defendant, The Great Western Mining and Manufacturing Company, and by means of said sale moneys to the amount of $75,000 were abstracted from the treasury of said company; that the issue and distribution of said capital stock was, as your receiver believes, a mere device or instrumentality to abstract said moneys from the treasury of said company; that said company as your receiver believes, has a valid claim against said persons to recover said moneys; that some of said parties are solvent and able to repay said monies, and proceedings should be taken to recover it for said company and its creditors.

"Your receiver further says that he has discovered from the books of the company that apparently, by reason of the inattention and negligence of the board of directors of the said Great Western Mining and Manufacturing Company, and apparently by reason of the mismanagement and misappropriation of the funds of the company, by certain members of said board, that the said company has been greatly damaged, and its assets depreciated in value in a large amount, the exact sum of which is unknown to your receiver, and that said losses should now be made part of the said company's assets, and that the same is, in the opinion of your receiver, a valid claim against the said board of directors, and that proceedings should be taken to recover the same for the said company and its creditors.

"Wherefore your receiver prays the direction of your honorable court as to his duty in the premises."

Upon this application the court made the following order:

"This cause coming on to be heard upon the application of L. C. Black, receiver herein, asking for instructions as to his duty in the matters and things set forth in the said application, and wherein said receiver represents to the court that in certain transactions connected with the floating of a loan of $300,000 upon the property of the Great Western Mining and Manufacturing Company, apparently $75,000 was withdrawn by certain stockholders and officers of the said company, whereas the same should have been paid into the treasury of the said company; and wherein said receiver further represents that apparently certain stock was issued to the stockholders and officers of the said company without consideration, and that apparently by reason of the inattention and negligence and mismanagement of the board of directors of the said company and the misappropriation of the funds of the said company, said company has been greatly damaged and its assets depreciated.

"And it appearing to the court that it will be for the advantage of the said company that suit shall be instituted against the stockholders and directors of the same for the recovery of the sums so represented to be lost, it is, therefore, directed that said receiver proceed in his own name as receiver or in the name of the company, as he may be advised, to recover said sums."

Mr. Justice DAY delivered the opinion of the Court.

The theory of the complainant's case seems to be that the transfers of the stock of the defendant and other directors and stockholders, paid for out of the proceeds of the bonds, in view of the allegations of the bill as to the condition of the company and the purposes in view by the defendant and associates, amounted to a breach of duty upon the part of the defendant and other directors, and a conversion to their own use of the property of the company, for which they should be held to account in an action brought by the company through its receiver, under the order of the Circuit Court of Kentucky. The particulars of the suit in which the receiver was appointed are not very fully set forth, but enough appears to show that he was appointed in a suit to adjudicate and enforce liens and subject the property to the payment of the claims of creditors. In the brief of the learned counsel for complainant, it is styled a "general creditors' and foreclosure suit." It does not appear that by order of the court or otherwise there has been any conveyance of the property and assets of the company to the receiver, nor has the corporation been dissolved, and the receiver made its successor, entitled to its property and assets. The minute books of the company in evidence do not show any authority by the corporation for the filing of this bill in the name of the Great Western Mining and Manufacturing Company or otherwise, although meetings were held after the appointment of the receiver. Nor is our attention called to any statute vesting the title of the corporation in the receiver. So far, then, as the receiver is concerned, his right to prosecute the action must depend upon his powers as such officer of the court and the order of the court, set forth in the statement of facts, authorizing him to bring suit against the stockholders and directors for the purpose of realizing the assets, either in his own name or that of the corporation, as may be proper. This condition of the record brings up for consideration at the threshold of this case the question of the extent of the power of the receiver to maintain this action under the order of the court, either in his own name or that of the company. As to the power of the court to authorize the receiver to sue, we think the case is ruled by *Booth* v. *Clark*, (17 How. 338,) in which case the authority of the court to authorize a receiver appointed in one jurisdiction to sue in a foreign jurisdiction was the subject of very full consideration. In that case it was held that a receiver is an officer of the court which appoints him, and, in the absence of some conveyance or statute vesting the

property of the debtor in him, he can not sue in courts of a foreign jurisdiction upon the order of the court which appointed him, to recover the property of the debtor. While that case was decided in 1854, its authority has been frequently recognized in this court, and as late as *Hale* v. *Allison*, (188 U. S. 56,) it was said by Mr. Justice Peckham, who delivered the opinion of the court:

"We do not think anything has been said or decided in this court which destroys or limits the controlling authority of that case."

In that case the following language, as to a receiver's powers, from *Booth* v. *Clark*, *supra*, is quoted with approval:

"He has no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek."

Mr. Justice Wayne, who delivered the opinion of the court in *Booth* v. *Clark*, stated, among others, the following reasons for refusing to recognize the powers of a receiver in foreign jurisdictions:

"We think that a receiver could not be admitted to the comity extended to judgment creditors, without an entire departure from chancery proceedings, as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court; and that it would be difficult to do, where it may be asked to be done, without the court exercising its province to determine whether the suitor, or another person within its jurisdiction, was the proper person to act as receiver."

It will thus be seen that the decision in *Booth* v. *Clark* rests upon the principle that the receiver's right to sue in a foreign jurisdiction is not recognized upon principles of comity, and the court of his appointment can clothe him with no power to exercise his official duties beyond its jurisdiction. The ground of this conclusion is that every jurisdiction, in which it is sought by means of a receiver to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein, and

not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court or its approval as to the officer who shall act in the holding and distribution of the property recovered. In *Quincy &c. Railroad Co.* v. *Humphreys*, (145 U. S. 82,) the powers of a receiver were under consideration, and the following language was quoted with approval (p. 98): "The ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the court, and by special authority may become an officer of the court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned." There are exceptional cases, such as *Relfe* v. *Rundle*, (103 U. S. 222,) in which the entire property of the insolvent company was vested in the superintendent of insurance of the State, where his authority did not come from the decree of the court, and his right to sue was maintained. In *Hawkins* v. *Glenn*, (131 U. S. 319,) it appeared that Glenn had derived title by assignment and deed and he was permitted to sue. In the case now before us it does not appear that the receiver had any other title to the assets and property of the company than that derived from his official relation thereto as receiver under the order of the court. In such a case we think the doctrine of *Booth* v. *Clark* is fully applicable. It is doubtless because of the doctrine therein declared that the practice has become general in the courts of the United States, where the property of a corporation is situated in more than one jurisdiction, to appoint ancillary receivers of the property in such separate jurisdictions. It is true that the ancillary receiverships are generally conducted in harmony with the court of original jurisdiction, but such receivers are appointed with a view of vesting control of property rights in the court in whose jurisdiction they are located. If the powers of a chancery receiver in the Federal courts should be extended so as to authorize suits beyond the jurisdiction of the court appointing him, to recover property in foreign jurisdictions, such enlargement of authority should come from legislative and not judicial action.

Nor do we think the jurisdiction is established because the action is authorized to be instituted by the receiver in the name of the corporation. Such actions subjecting local assets to a foreign jurisdiction and to a foreign receivership would come within the reasoning of *Booth* v. *Clark*. If a recovery be had, although in the name of the corporation, the property would be turned over to the receiver, to be by him administered under the order of the court appointing him.

It is urged that jurisdiction in this case is sustained by the case of *Great Western Tel. Co.* v. *Purdy*, (162 U. S. 329,) in which it was held that the assets and affairs of an insolvent corporation being in the hands of a receiver, the court might direct the calls or assessments upon delinquent shareholders who had not paid for their shares, thereby using the authority

the directors might have exercised before the appointment of the receiver. In that case, a receiver appointed by the Circuit Court of Cook County, in Illinois, under the direction of that court brought an action in the name of the Great Western Telegraph Company, an Illinois corporation, by its receiver, against Purdy, a citizen of Iowa, to recover a sum alleged to be due from him upon an assessment upon his stock subscription, and it was held that the Illinois court might make the assessment and calls necessary to collect the stock which would be binding in another court. The jurisdiction of the Iowa court was not called in question in the State court of Iowa, where the original action was brought, nor was the question of jurisdiction raised in this court, or passed upon in deciding the case. While not detracting from the authority of that case as to the matter decided, we see nothing in it to indicate that had the question herein presented been made it would have been decided otherwise than herein indicated.

There are numerous and conflicting decisions in the State courts as to the rights of a receiver to sue in a foreign jurisdiction upon principles of comity, which it is not necessary to review here. In this court, since the case of *Booth* v. *Clark*, *supra*, we deem the practice to be settled, and to limit a receiver, who derives his authority from his appointment as such, to actions, either in his own name, or that of an insolvent corporation, to such as may be authorized within the jurisdiction wherein he was appointed.

We think the Circuit Court of Appeals was right in holding that the Circuit Court had no jurisdiction of this action.

This view of the case renders it unnecessary to consider the other questions made in the record.

Decree affirmed.

Mr. Justice BREWER concurs in the decree.

True copy.

Test:

Clerk Supreme Court, U. S.